SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 71

I. N. GORDON, APPELLANT,

vs.

STATE OF TEXAS.

APPEAL FROM THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

FILED NOVEMBER 14, 1956
JURISDICTION NOTED JANUARY 28, 1957

OCTOBER TERM, 1957

No. 71

I. N. GORDON, APPELLANT,

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[fol. 2] (Caption omitted)

[fol. 3]

IN COUNTY COURT AT LAW OF HIDALGO COUNTY, TEXAS

COMPLAINT—Filed August 25, 1955

BEFORE ME, the undersigned authority, this day personally appeared

H. C. BLAKEMORE

who, after being sworn, upon oath says (that he has good reason to believe and charge) that one I. N. GORDON on (or about) the 24th day of August A. D., 1955, and before the making and filing of this complaint, in Hidalgo County, and State of Texas, did then and there unlawfully and wilfully have in his possession an illicit alcoholic beverage containing more than one-half of one per cent of alcohol by volume, and capable of use for beverage purposes alone, and when diluted, to-wit, Rum, in a container to which no tax stamp showing the payment of the tax on said beverage due to the State of Texas was affixed, and to which so unstamped container no valid evidence was affixed showing the payment of the tax on such beverage due to the State of Texas, and a tax stamp was then and there required by the laws of the State of Texas to be affixed to such container, and a tax on such beverage was then and there due to the State of Texas, and the tax imposed by the laws of the State of Texas on such illicit beverage had not been paid.
against the peace and dignity of the State.

/s/ H. C. BLAKEMORE

Duly sworn to by J. Bates jurat omitted in printing. (All in italics)

[fol. 4] (File Endorsement Omitted)

[fol. 5] IN THE

COUNTY COURT AT LAW OF HIDALGO COUNTY, TEXAS

INFORMATION—filed August 25, 1955

JIM BATES, Criminal District Attorney (County Attorney) of the County of Hidalgo, State aforesaid, in behalf

of said State, presents in the County Court-at-Law of Hidalgo County, State of Texas, at the JULY Term, 1955, of said Court, that I. N. GORDON on or about the 24th day of August, 1955, and before the making and filing of this information, in the County of Hidalgo, State of Texas, did then and there unlawfully, and willfully have in his possession an illicit alcoholic beverage containing more than one-half of one per cent of alcohol by volume, and capable of use for beverage purposes alone, and when diluted, to-wit, Rum, in a container to which no tax stamp showing the payment of the tax on said beverage due to the State of Texas was affixed, and to which so unstamped container no valid evidence was affixed showing the payment of the tax on such beverage due to the State of Texas, and a tax stamp was then and there required by the laws of the State of Texas to be affixed to such container, and a tax on such beverage was then and there due to the State of Texas, and the tax imposed by the laws of the State of Texas on such illicit beverage had not been paid.

Against the peace and dignity of the State.

JIM BATES
Criminal District Attorney
(County Attorney) of Hidalgo
County, said State

By /s/ J. BATES

(File Endorsement Omitted)

[fol. 6]

IN THE

COUNTY COURT AT LAW OF
HIDALGO COUNTY, TEXAS

No. Cr 1475

STATE OF TEXAS

vs

I. N. GORDON

DEFENDANT'S FIRST AMENDED MOTION TO DISMISS COMPLAINT AND INFORMATION—filed November 8, 1955

To the Honorable Judge of Said Court:

Now comes, I. N. Gordon, defendant in the above entitled and numbered cause and presents this his first amended motion to dismiss the complaint and information in this cause and in support thereof would show the Court the following:

I

Defendant is a resident of the State of North Carolina. At the time of his arrest, he was traveling through the State of Texas on a return trip from the Republic of Mexico to the State of his residence, North Carolina. Defendant would show that the goods, upon which no payment of tax, was made, were purchased in the Republic Mexico and such goods were still in the original package as when purchased in the Republic of Mexico. Defendant would further show the court that the Defendant's expressed intention, as to such goods, was merely to carry the same through the State of Texas to the final destination thereof, the State of North Carolina, and that defendant's expressed intention was not to use or sell such goods in the State of Texas.

II

Defendant would show the Court that the Stamp Tax, which allegedly was not paid by this defendant, and which nonpayment of tax forms the basis of the complaint and information in this cause, is in violation of Article 1, Section 8, Clause 3 of the Constitution of the United States of America as being a burden on the movement of goods in interstate commerce. Such Stamp Tax being in vilation of the Constitution of the United States of America is void as to this defendant and therefore [fol. 7] could not form a basis for a complaint or information against this defendant.

III

Defendant would show the Court that the Stamp Tax which is sought to be imposed, and the possession after the nonpayment of said tax forms the basis of the complaint and information in this cause, is a tax on articles imported into the territorial limits of the United States

of America from a foreign country, and which said articles are still in the original package in which they were imported. Such tax is void as to such articles and this defendant as it is in violation of Article 1, Section 10, Clause 2 of the Constitution of the United States of America. Such Stamp Tax being void as a violation of the Constitution of the United States of America could not, therefore, form a basis for a complaint and information against this defendant.

IV

Defendant would further show the Court that the provisions of the Texas Liquor Control Act were not intended to apply to this defendant or to persons simularly situated and that the Liquor Control Act was not intended to apply to goods in transit through the State. —Wherefore, premises considered, this Defendant prays that upon hearing of this motion that the Court dismiss the complaint and information in this cause and that he go hence without day.

/s/ B. R. STEWART
B. R. STEWART
EDINBURG, TEXAS
Attorney for Defendant

(File Endorsement Omitted)

[fol. 9]

IN THE
COUNTY COURT AT LAW
HIDALGO COUNTY, TEXAS

(Title Omitted)

DEFENDANT'S MOTION TO QUASH COMPLAINT AND INFORMATION—filed November 14, 1955

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES, I. N. GORDON, defendant in the above entitled and numbered cause and presents this his motion to quash the complaint and information in this cause and in support thereof would show the Court the following;

I

Defendant is a resident of the State of North Carolina. At the time of his aresst, he was traveling through the State of Texas on a return trip from the Republic of Mexico to the State of his residence, North Carolina. Defendant would show that the goods, upon which no payment of tax was allegely made, were purchased in the Republic of Mexico and such goods were still in the original package as when purchased by this defendant in the Republic of Mexico. Defendant would further show the court that the Defendant's espressed intention, as to such goods, was merely to carry the same through the State of Texas to the final destination thereof, to wit: The State of North Carolina, and that Defendant's expressed intention was not to use, sell or distribute such goods in the State of Texas.

II

Defendant would show the court that the Stamp Tax, which allegedly was not paid by this defendant, and which nonpayment of tax forms the basis of the complaint and information in this cause, is in violation of Article 1, Section 8, Clause 3 of the Constitution of the United States of Americas for the reason that such tax is a burden on the movement of goods in interstate commerce. Such Stamp Tax being in violation of the Con-
[fol. 10] stitution of the United States of America is void as to this defendant and therefore could not form a basis for a complaint and information against this defendant.

III

Defendant would show the Court that the Stamp tax which is sought to be imposed, and the alleged possession after the nonpayment of said tax forms the basis of the complaint and information in this cause, is a tax on articles imported into the territorial limits of the United States of America from a foreign country, and which said articles were still in the hands of the original importer and in the original package in which they were imported. Such tax is void as to such articles above mentioned and as to this defendant as such tax is in violation of Article 1, Section 10, Clause 2 of the Constitu-

tion of the United States of America. Such Stamp Tax being void as a violation of the Constitution of the United States of America, could not, therefore, from a basis for a complaint and information against this defendant.

IV

Defendant would further show the Court that the provisions of the Texas Liquor Control Act were not intended to apply to this defendant or to persons simularly situated and that the Liquor Control Act, by its very terms, was not intended to apply to goods in transit through the State of Texas.

V.

Defendant would further show the Court that the offense sought to be charged in the complaint and information is not set forth in plain intelligible words, and further that the complaint and information are so vague and indefinite that this defendant is unable to ascertain the offense with which he is charged and that therefore he is unable to properly prepare his defense in this cause.

Wherefore premises considered, this defendant prays the court that the complaint and information in this cause [fol. 11] be quashed and that he be discharged from custody and that he go hence without day.

/s/ B. R. Stewart
Edinburg, Texas
Attorney for Defendant

Duly sworn to by Ian N. Gordon jurat omitted in printing. (All in italics)

(File Endorsement Omitted)

[fol. 12] In The
COUNTY COURT AT LAW OF
HIDALGO COUNTY, TEXAS

(Title Omitted)

Charge of the Court—filed November 15, 1955

Ladies and Gentlemen of the Jury:

The defendant, I. N. Gordon, stands charged by information with the offense of having in his possession illicit alcoholic beverage, to-wit, rum, not contained in a container to which is affixed a tax stamp or other valid evidence showing the payment of taxes on such illicit alcoholic beverage, to-wit, rum, due to the State of Texas, alleged to have been committed in the County of Hidalgo and State of Texas on or about the 24th day of August, 1955.

To this charge the defendant has pleaded "Not Guilty."

You are instructed that the laws of this State make it unlawful for any person to have in his possession illicit alcoholic beverage containing more than one-half of one per cent (½ of 1%) of alcohol by volume which is capable of use for beverage purposes, either alone or when diluted. By the term illicit beverage is meant any alcoholic beverage possessed on which any tax imposed by the laws of this State has not been paid and the tax stamp affixed thereto.

Now, if you believe from the evidence beyond a reasonable doubt that the defendant, I. N. Gordon, did, in the County of Hidalgo and State of Texas, on or about the 24th day of August, 1955, have in his possession an illicit alcoholic beverage, to-wit, rum, not contained in a container to which was affixed a tax stamp or other valid evidence showing the payment of taxes on such alcoholic beverage, to-wit, rum, due to the State of Texas, as charged in the Information, then you will find him guilty of a misdemeanor and fix his punishment at a fine of not less than One Hundred Dollars ($100.00) nor more than [fol. 13] One Thousand Dollars ($1,000.00), or confinement in the county jail for not more than one (1) year, or by both such fine and imprisonment.

You are instructed that the defendant is presumed to be innocent until his guilt is established by legal evidence, beyond a reasonable doubt; and in this connection you must find that the State has proven beyond a reasonable doubt each and every allegation in the information and in case you have a reasonable doubt as to the defendant's guilt or as to whether the State has proven each and every allegation of the information, you will acquit him, and say by your verdict "Not Guilty."

You are further charged that in the event you convict the defendant is is not permissible for you under any circumstances in fixing the penalty to decide the same by lot. It sometimes happens that when juries are unable to agree as to the punishment to be inflicted, if any, they decide that each juror shall set down the amount of fine or length of imprisonment, in the juror's judgment, the punishment should be, all of which to be added together, and the sum total to be divided by six, and the quotient so ascertained by that division to constitute the verdict of the jury. This conduct is deciding a case by lot, and is not permissible, and you are instructed in this case that if you convict the defendant you must not consider any proposition of this character, but the punishment, if any, to be assessed, must be determined and agreed upon by each of the jurors on the facts of the case, as testified to by the witnesses and the law as given you in charge by the Court.

You are further instructed that the complaint and information filed against the defendant in this case cannot be considered by you as any evidence of the defendant's guilt.

You are the exclusive judges of the facts proved, of the credibility of the witnesses, and of the weight to be given to the testimony, but you are bound to receive the law from the Court, which is herein given you, and be governed thereby.

[fol. 14]

/s/ TOM L. HARTLEY
Judge of the County Court at Law
of Hidalgo County, Texas.

FORMS OF VERDICT

We, the Jury, find the defendant "Not Guilty."

.....
Foreman

We, the Jury, find the defendant guilty as charged in the complaint and information, and assess his punishment at a fine of $100.00.

/s/ A. S. LOVE
Foreman

We, the Jury, find the defendant guilty as charged in the complaint and information, and assess his punishment at imprisonment in jail for a term of.....

.....

Foreman

We, the Jury, find the defendant guilty as charged in the complaint and information, and assess his punishment at a fine of $....., and at imprisonment in jail for a term of.....

.....

Foreman

(File Endorsement Omitted)

[fol. 15] IN THE

COUNTY COURT LAW OF
HIDALGO COUNTY, TEXAS

CR-1475

STATE OF TEXAS

vs.

I. N. GORDON

FINAL JUDGMENT—December 22, 1955

Be it remembered that on the 11th day of December, A. D. 1955, came on to be heard in the above entitled and numbered cause Defendant's Motion to Dismiss Complaint and Information and came the State by and through her Criminal District Attorney, and the Defendant in his own proper person and by his attorney of record; and the court having considered the pleadings of the parties, the arguments of the Counsel and the law and the facts, is of the opinion that the motion to dismiss complaint and information should be denied,

It is therefore considered, ordered and adjudged by the Court that the said motion to dismiss complaint and information be and the same is hereby refused, and in all things overruled. Whereupon the defendant I. N.

Gordon, in open court, excepted to such judgment and ruling of the court.

Be it further remembered that on the 14th day of November A. D. 1955 this cause was called for trial and came the State by and through her Criminal District Attorney, and then came the defendant in his own proper person and by his attorney of record, and defendant presented his Motion to Quash Complaint and Information and the court having heard the said motion is of the opinion that the same should be refused and denied. It is therefore considered, ordered and adjudged by the court that the said motion to quash complaint and information herein be and the same is refused, and in all things overruled and denied. Whereupon the defendant, I. N. Gordon, in open court, excepted to such judgment and ruling of the court.

And then came both parties and announced ready for trial, and the defendant, I. N. Gordon, pleaded not guilty
fol. 16 to the information herein, and a jury, to-wit, A. S. Love and five others, was duly selected, impaneled, and sworn, who having heard the information read, and the defendant's plea of not guilty thereto, and having heard the evidence submitted, defendant made a motion before the court to instruct the jury to bring in a verdict of not guilty, which motion for instructed verdict was refused by the court and to which ruling of the court the defendant in open court excepted; and the jury having then been duly charged by the court, retired to consider of their verdict, and afterward returned into open court in due form of law the following verdict, which was received by the court, and is here now entered upon the minutes, to-wit;

> "We, the jury, find the defendant, I. N. Gordon guilty as charged in the information and assess his punisiment at a fine of $100.00 Dollars"
>
> (Signed) A. S. Love
> Foreman

It is, therefore considered, ordered, and adjudged by the court, that the State of Texas do have and recover of the defendant, I. N. Gordon, the said fine of $100.00 Dollars and all the costs of this prosecution, and the said

defendant, being present in court, is placed in the custody of the Sheriff who will commit him forthwith to jail until such fine and costs are paid. And execution may issue against the property of said defendant for the amount of such fine and costs. Whereupon the defendant, I. N. Gordon, in open court, excepted to such judgment and gave notice of an appeal herein to the Court of Criminal Appeals of the State of Texas, sitting at Austin, Texas, which said notice is here now entered of record.

It is thereupon ordered by the court that the said defendant enter into a recognizance herein in the sum of $250.00 Dollars, in the manner and conditioned as the law in such case requires.

/s/ Tom L. Hartley
Tom L. Hartley, Judge
County Court-at-Law

[fol. 17] Approved as to form:

B. R. Stewart, Attorney for defendant
Jim Bates, Criminal District Attorney for the State of Texas.

(File Endorsement Omitted)

[fol. 19] IN THE
COUNTY COURT AT LAW OF
HIDALGO COUNTY, TEXAS

(Title Omitted)

BILL OF EXCEPTIONS I—filed December 27, 1955

Be it remembered that on the 11th day of November, A. D. 1955 came on to be heard in the above entitled and numbered cause the defendant's First Amended Motion to Dismiss Complaint and Information, reference to which is here made for all purposes. Said motion being based on the premise that the tax which forms the basis of the complaint and information in this cause, is unconstitutional under Article 1, Section 8, Clause 3 and Article 1, Section 10, Clause 2 of the Constitution of the United States of America and being further based on the premise that the tax set up by the liquor control act

was not intended to apply to the defendant in this cause or to those simularly situated and that the liquor control act was not intended to apply to goods in transit through the state of Texas. The Court considered the pleadings of the defendant and the answer of the State of Texas and the arguments of counsel and then denied defendant's First Amended Motion to Dismiss Complaint and Information; to which decision and order of the court the defendant then and there excepted and tenders this bill of exceptions, and asks that the same be signed and filed as a part of the record in this cause.

/s/ B. R. Stewart
Attorney for defendant

ORDER ALLOWING—December 21, 1955

The foregoing bill of exception No. 1 having been reduced to writing by counsel for defendant, and having been presented to the undersigned presiding judge of said court for allowance and signature within 40 days and within the time prescribed by law, and having been [fol. 20] by me submitted to counsel for the State of Texas and found by him to be correct, and having been by me found to be correct, is hereby allowed, approved and ordered filed by the clerk of this court as a part of the record in such cause, this 21st day of December, A. D. 1955.

/s/ Tom L. Hartley
Judge of the County Court at Law
Hidalgo County, Texas

(File Endorsement Omitted)

[fol. 21] (Title Omitted)

BILL OF EXCEPTIONS II—filed December 27, 1955

Be it remembered that on the 14th day of November, A. D. 1955 came on to be heard in the above entitled and numbered cause the defendant's Motion to Quash Complaint and information, reference to which is here made for all purposes. Said motion was based on the premise that the tax, with possession of liquor without payment of said tax forming the basis of the complaint and in-

formation in this cause, is unconstitutional under article 1, section 8, clause 3 of the Constitution of the United States of America as being a tax on goods moving in interstate commerce; under article 1, section 10, clause 2 of the constitution of the United States of America as being a tax on goods imported into the continental limits of the United States from a foreign country, and upon the further premise that the tax set up by the Liquor Control Act was not intended to apply to this defendant or to other persons who are merely carrying liquor for their own personal use through the State of Texas. Defendant's sworn motion to quash alleged that the liquor was purchased in the Republic of Mexico, that the same was still in the original package in which it was purchased, that the defendant's intention as to the liquor was to carry the same through the State of Texas and not to use, sell or dispose of the same in the State of Texas. Whereupon the Court considered the sworn pleadings of the defendant, the State's answer and the arguments of counsel and then denied defendant's Motion to Quash Complaint and Information; to which decision and order of the Court the defendant then and there excepted [fol. 22] and tenders this bill of exceptions, and asks that the same be signed and filed as a part of the record in this cause.

/s/ B. R. Stewart
Attorney for defendant

ORDER ALLOWING—December 27, 1955

The foregoing bill of exception No. 2 having been reduced to writing by counsel for defendant, and having been presented to the undersigned presideing judge of said court for allowance and signature within 40 days and within the time prescribed by law, and having been by me submitted to counsel for the State of Texas and found by him to be correct, and having been by me found to be correct, is hereby allowed, approved and ordered filed by the clerk of this court as a part of the record in such cause, this 27th day of December, A. D. 1955.

/s/ Tom L. Hartley
Judge of the County Court at Law
Hidalgo County, Texas

(File Endorsement Omitted)

[fol. 23] (Title Omitted)

BILL OF EXCEPTIONS III—filed December 27, 1955

Be it remembered that on the 14th day of November, A. D. 1955 came on to be heard the above entitled and numbered cause. After all the evidence had been presented to the jury by the State and by the Defendant, both sides rested and the defendant made a motion that the Court instruct the jury to bring a verdict of not guilty. Said motion for instructed verdict was requested for the following reasons:

1. Based on the evidence presented to the jury and under the law, the tax forming the basis of the complaint and information was void and unconstitutional under Article 1, section 8, clause 3 of the Constitution of the United States of Americas as being a tax on goods moving in interstate commerce. Such tax being void and unconstitutional could not support a complaint and information charging possession of untaxed liquor.

2. Based on the evidence presented to the jury and under the law, the tax forming the basis of the complaint and information was void and unconstitutional under Article 1, section 10, clause 2 of the Constitution of the United States of Americas as being a tax by a state on goods imported into the continental limits of the United States from a foreign country, which said goods imported were still in the original package in which they were purchased. Such tax being void and unconstitutional could not support a complaint and information charging possession of untaxed liquor.

3. Based on the evidence presented to the jury and under the law, the tax, forming the basis of the com-
[fol. 24] plaint and information, as set up by the Texas Liquor Control Act was not intended by the Legislature to apply to any person, including this defendant, who was merely carrying liquor for his own personal use through the State of Texas.

The Court having considered defendant's motion for an instructed verdict, denied and overruled the same; to which decision and order of the Court the defendant then and there excepted and tenders this bill of excep-

tion and asks that the same be signed and filed as a part of the record in this cause.

/s/ B. R. Stewart
Attorney for defendant

ORDER ALLOWING—December 21, 1955

The foregoing bill of exception No. 3 having been reduced to writing by counsel for defendant, and having been presented to the undersigned presiding judge of said court for allowance and signature within 40 days and within the time presceibed by law, and having been by me submitted to counsel for the State of Texas and found by him to be correct, and having veen by me found to be correct, is hereby allowed, approved and ordered filed by the clerk of this court as a part of the record in such cause, this 21st day of December, A. D. 1955.

/s/ Tom L. Hartley
Judge of the County Court at Law
Hidalgo County, Texas

[fol. 25] (Title Omitted)

BILL OF EXCEPTIONS IV—filed December 27, 1955

Be it remembered that upon trial of the above entitled and numbered cause, before the Court's Charge was read to the jury the Defendant presented his objections in writing thereto, and presented to the Court written instructions as follows, to-wit:

I

If you find from the evidence beyond a reasonable doubt that the tax mentioned in the information on file in this cause was a tax on an article imported from a foreign country, which said article was in the hands of the original person importing said article and that such article was still in the original container in which it was imported into this country, then you will find the defendant, I. N. Gordon, not guilty and so say by your verdict.

II

If you believe from the evidence beyond a reasonable doubt that the defendant, I. N. Gordon, had in his possession an intoxicating beverage intended for shipment to a place without the State of Texas and that the said intoxicating beverage was intended for the own consumption of the defendant, I. N. Gordon, then you will find the defendant not guilty and so say by your verdict.

III

If you believe from the evidence beyond a reasonable doubt that the defendant, I. N. Gordon, had in his possession an alcoholic beverage which was not intended for use or distribution within the State of Texas but was merely being carried through the State of Texas [fol. 26] by the defendant, I. N. Gordon, then you will find the defendant, I. N. Gordon, not guilty and so say by your verdict.

IV

You are instructed that the laws of the United State of America duly enacted by the Congress provide that any person returning to the United States of America from a foreign country may bring into the United States, alcoholic beverages not in excess of one gallon which said alcoholic beverage shall be admitted free of any import duty assessed by the United States of America.

VI

You are instructed that the laws of this State impose a tax on the first sale of Distilled spirits except when a person authorized to export liquor from the state has in his possession any liquor intended for shipment to any place without the state, which liquors are kept in a separate compartment from that of liquors intended for sale within the State and when such liquors are so segregated and stamped to show that they are intended for shipment to a place without the state as required by regulations of the Liquor Control Board, then and in that event no tax shall be charged.

You are further instructed that any person who purchases alcoholic beverages for his own consumption may

transport same from a place where the sale thereof is legal to a place where the possession thereof is legal.

You are instructed that the sale of alcoholic beverages is legal in the Republic of Mexico.

VII

You are instructed that the basis of the information in this cause is possession of an illicit alcoholic beverage as heretofore defined, and that the beverage is not illicit if the tax on the liquor is not a valid tax or if the tax were not legally due the State of Texas on such liquors.

[fol. 27]

VIII

If you believe from the evidence beyond a reasonable doubt that the defendant, I. N. Gordon, did, in the County of Hidalgo and the State of Texas, on or about the 24th day of August, 1955, have in his possession an illicit alcoholic beverage, to wit, Rum, in a container to which no stamp was affixed showing the payment of a valid tax or other valid evidence showing the payment of a valid tax on such alcoholic beverage, to wit: Rum, validly due to the State of Texas, as charged in the information, then you will find him guilty of a misdemeanor and fix his punishment at a fine of not less than One Hundred ($100.00) Dollars nor more than One Thousand ($1,000.00) Dollars or confinement in the county jail for not less than one day nor more than one year or by both such fine and imprisonment.

IX

You are instructed the State of Texas cannot impose a tax on any article, including intoxicating liquors, which is imported into the continental United States from a foreign country so long as the article imported is in the hands of the original importer and so long as the same is in the original package in which it was imported into this country.

and asked the court that the same be given to the jury; which the court refused to do, and the defendant then excepted to the decision of the court regusing to give said instructions and tenders this bill of exception and

asks that the same be signed and filed as a part of the record in this cause.

/s/ B. R. Stewart
Attorney for Defendant.

ORDER ALLOWING—DECEMBER 21, 1955

The foregoing bill of exception No. 4 having been reduced to writing by counsel for defendant, and having been presented to the undersigned presiding judge of said court for allowance and signature within 40 days and within the time prescribed by law, and having been [fol. 28] by me submitted to counsel for the State of Texas and found by him to be correct, and having been by me found to be correct, is hereby allowed, approved and ordered filed by the clerk of this court as a part of the record in such cause, this 21st day of December, A. D. 1955.

/s/ Tom L. Hartley
Judge of the County Court at Law
Hidalgo County, Texas

(File Endorsement Omitted)

[fol. 30] Clerk's Certificate to foregoing transcript omitted in printing

[fol. 31] IN THE
COURT OF CRIMINAL APPEALS

No. 28,219

I. N. GORDON, *Appellant*

v.

THE STATE OF TEXAS, *Appellee*

Appeal from Hidalgo County

OPINION—May 23, 1956

An illicit beverage, within the meaning of the Texas Liquor Control Act, is any alcoholic beverage on which a tax imposed by the laws of this state has not been paid and a tax stamp affixed thereto (Art. 666-3a, Sec. (4), Vernon's P. C.).

It is unlawful to possess an illicit beverage in this state (Art. 666-17, Sec. (13), Vernon's P.C.).

The information alleged a violation of those statutes—that is, that appellant possessed an illicit alcoholic beverage, to-wit, rum.

The undisputed evidence shows that appellant, accompanied by two other persons, entered the United States from the Republic of Mexico at the port of entry at Hidalgo, Texas. At that time, he had in his possession eleven bottles each containing one-fifth gallon of rum, which he had purchased in the Republic of Mexico.

The tax due the State of Texas had not been paid thereon and no tax stamp evidencing such payment was attached to the bottles.

After appellant had passed the United States Customs' inspection and had entered the State of Texas, an agent of the Texas Liquor Control Board requested payment by appellant of the tax due on the rum and that a stamp evidencing such payment be affixed to the bottles.

Appellant refused to pay the tax, and his arrest followed.

Upon the trial of the case appellant testified that he had purchased the rum in the Republic of Mexico and, when apprehended, was on his way and transporting the rum to his home in North Carolina, and that he had no other intent in the possession or transportation of the [fol. 32] rum. That testimony was not controverted.

Appellant's conviction followed, with punishment assessed at a fine of $100.

It is appellant's contention that there was no tax due the State of Texas upon the rum, and that any statute of this state levying a tax thereon was void. This contention is based upon two propositions of law: (a) that Art. 1, Sec. 10, Clause 2, of the Constitution of the United States, the export-import clause, prohibits the State of Texas from levying a tax on the rum; and (b) that the rum was then moving in interstate commerce through the State of Texas when it was seized, and therefore could not be subject to taxation by the State of Texas, under Art. 1, Sec. 8, Clause 3, the commerce clause, of the Constitution of the United States.

It becomes material to notice the tax imposed by this state, and here challenged.

By statute, rum is a distilled spirit (Art. 666-3a, Sec. (3), Vernon's P. C.).

A tax is levied and imposed on the "first sale" of distilled spirits in this state (Art. 666-21; Vernon's P. C.).

The term "first sale," as above used, means, among other things, the first possession of any liquor imported into this state.

For tax purposes, distilled spirits imported from any foreign country are subject to taxation and must have affixed thereto the appropriate Texas tax stamp (Art. 666-17, Sec. (32), Vernon's P. C.

So then, there is no question but that the State of Texas has levied a tax upon the rum involved and shown by the facts of this case. If that tax is valid, this conviction should be affirmed; if not, then a reversal of the conviction should follow.

The tax imposed is not a property tax. Nor it is a tax [fol. 33] upon the privilege of importing or bringing the liquor into this state. The tax is a use or privilege tax, levied for the privilege of possessing the liquor in this state.

We are not here dealing with the possession or transportation of an article of ordinary merchandise or property. To the contrary, intoxicating liquor has always been subject to regulation by the state in the exercise of its police power. In fact, the Liquor Control Act expressly so provides (Art. 666-2, Vernon's P. C.).

We therefore have no difficulty in reaching the conclusion that the tax, here, was imposed upon the first possession of the liquor after its importation into this state.

It is apparent that the tax involved is not an import tax nor a tax upon an importation. In fact, the instant tax could not become an import tax because the importation must have been completed before the tax here levied attached.

We are constrained to conclude that the tax here involved is not prohibited by the import-export clause of the Federal Constitution.

As has been suggested, the commerce clause of the Federal Constitution is limited by the 21st Amendment thereto, wherein it is expressly provided that:

"The transportation or importation into any State,

Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

By Art. 666-8, Vernon's P. C., the legislature of this state has made it unlawful for one to import into this state, without a permit, any liquor in excess of one quart. In addition to the penal provision of the statute, forfeiture to the state of the liquor unlawfully imported is mandatory.

The quantity of rum here involved invokes that statute.

The Liquor Control Act provides various permits whereby liquor may be lawfully imported into this state. [fol. 34] There appears no escape from the conclusion that the rum was unlawfully imported by appellant into this state and therefore was not and could not be a commodity moving in interstate commerce.

In addition to the foregoing, note is taken of the fact that when the rum was transported to this state it was then subject to the tax imposed therein. Unless and until that tax was paid, the rum was an illicit beverage, and contraband subject to be seized as such.

This being true, the rum could not come under interstate commerce regulation. As it was contraband, the right to possess and to transport it did not exist.

From what has been said, we are unable to agree that the rum, when seized, was moving in interstate commerce.

The judgment of the trial court is affirmed.

Davidson, Judge

(Delivered May 23, 1956)

[fol. 35] (File Endorsement Omitted)

[fol. 36]

IN

COURT OF CRIMINAL APPEALS

AUSTIN, TEXAS

No. 28,219

I. N. GORDON, *Appellant*,

v.

THE STATE OF TEXAS, *Appellee*.

Appeal from County Court at Law of
Hidalgo County, Texas

MINUTE ENTRY OF JUDGMENT—May 23, 1956

Affirmed Opinion by Judge Davidson May 23, 1956

This cause came on to be heard on the transcript of the record of the Court below, and the same being inspected because it is the opinion of this Court that there was no error in the judgment, it is ordered, adjudged and decreed by the Court that the judgment be in all things affirmed, and that the appellant pay all costs in this behalf expended, and that this decision be certified below for observance.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 37] IN THE
COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS
SITTING AT AUSTIN, TEXAS

No. 28,219

(Title Omitted)

(File Endorsement Omitted)

MOTION FOR REHEARING—filed June 7, 1956

Now comes the appellant in the above numbered and entitled cause, and respectfully moves the court to set aside the judgment heretofore rendered in this court on the 23rd day of May, 1956, affirming the judgment of the court below, and to grant a rehearing and reverse said judgment of the court below, good cause appearing, as follows:

I

Because the court erred in rendering its opinion in this cause which said opinion assumed that this defendant was relying on avoiding the tax imposed by the state of Texas by stating that such tax was void by virtue by two interdependent provisions of the United States Constitu-

tion to-wit: (a) Article I, Section 10, Clause 2, the import-export clause. (b) Article I, Section 8, Clause 3, the Commerce clause. It is defendant's contention that the tax is void on the rum brought into the United States by this defendant under either the import-export clause or under the commerce clause of the United States Constitution or that the tax could be void under both the import-export clause and the commerce clause of the United States Constitution. It is defendant's contention that the tax was void as being in violation of the import-export clause so long as the rum remained an import and that no tax by the State of Texas could be validly assessed until such time as the importation ceased. Defendant's other contention is that regardless of whether this article is an import or not, the fact that the goods were moving in interstate commerce was sufficient to bring the goods within the provision of the commerce clause of the United States Constitution, and any tax assessed on the goods while moving through the State of Texas, and not for delivery or use in the State of Texas, would be violative of the commerce clause of the Federal Constitution, the 21st Amendment not withstanding. The import-export clause and the commerce clause of the Federal Constitution are separate and distinct portions of the Constitution, either of which would be sufficient to knock down the tax sought to the imposed, without reliance of one upon the other. The two provisions of the court may supplement each other but are [fol. 38] not dependant upon each other for declaring the tax imposed as being invalid.

Because the court erred in assuming that the importation by the defendant herein was completed the very instant that the rum passed by the Federal Customs officers this defendant has raised the issue that such a tax as as attempted to be here imposed was unconstitutional under Article 1, Section 10, Clause 2 of the Constitution of the United States, the import-export clause. The defendant recognizes that the various portions of Article 666, Vernons Annotated Penal Code attempt to impose a tax upon the liquor such as that which was brought in by this defendant. However, it is submitted that in determining whether the provisions of Article 666 are

violative of any provision of the Federal Constitution, that the wording of the constitutional provisions and the decisions of the United States Supreme Court regarding such provision must be looked to as a guide and yard-stick to determine what an import is and when an article ceases to be an import. This honorable court has stated that such a tax as is sought to be imposed was not an import tax because the importation must have been completed. However, looking to the Federal decisions we find that in Low vs. Austin, 80 U.S. 517, Page 519, the Supreme Court states, " . . . . that the goods imported do not lose their character as imports, and become incorporated into the mass of property of the state, until they have passed from the control of the importer or been broken up by him from their original cases. *Whilst retaining their character as imports, a tax upon them in any shape, is within the constitutional prohibition.*" * The U. S. Supreme Court further stated in Hooven & Allison Company v. Evatt, 324, U.S. 652, 65 SCt 870, Page 879, " . . . , that things imported are imports entitled to the immunity conferred by the constitution: *that that immunity survives their arrival in this country and continues until they are sold, removed from the original package, or put to the use for which they are imported.*" * Here, obviously, by the statement of fact the rum was still in the hands of the three original importers to-wit: The defendant and his companions, and the rum was still in the original bottles in which they were imported and had not been put or intended to be put to the use for which they were imported, until such time as the rum was without the confines of the State of Texas. The U. S. Supreme Court has further said in the License Cases 46 U.S. 504, 5 How. 256, Page 609, "But while foreign liquors, imported according to the regulations of Congress remain in the cask, bottle, etc, in the original form, *the importer may sell them in that form at the port of entry, or in any other part of the United States, nor can any State law hinder the importer from doing so;* * nor does it make [fol. 39] any difference whether the imported article paid a tax on its introduction or was admitted as a free

* Italics added.

article; *until it passes from the hands of the importer, it is "an import", and belongs to regulated "foreign commerce" and is protected.*" It is here submitted that the importation of the rum would not have been completed by the defendant and his companions until such time as the rum was used in the State of North Carolina, and that any tax upon the rum by the State of Texas or any state between here and North Carolina would be clearly violative of the constitutional provision forbidding State taxes on imports.

There is a definite distinction to be applied as to imports into a state and imports which are merely traveling through a state to a final destination. Under the decisions above mentioned the immunity from state tax survives the arrival of an import into continental United States, until such time as the article imported has become a part of the general mass of goods within a state. The statement of facts shows that this rum was never intended by the defendant and his two companions to become a part of the general mass of goods within the state of Texas, and that by virtue thereof, any tax sought to be imposed by the State of Texas must fail as being a tax upon an import while such goods are still an import under the decisions of the United States Supreme Court.

III

Because this honorable court erred in assuming that the commerce clause of the Federal Constitution is limited by the 21st amendment, in that it failed to take note that the transportation or importation into any state prohibited by the 21st amendment *must be for delivery or use therein.* The rum brought into the United States by the defendant and his two companions was not intended for delivery or use in the State of Texas and consequently the 21st amendment would be of no assistance in upholding a tax which violated Article I, Section 8, Clause 3, the Commerce Clause of the Constitution of the United States.

Appellant represents that the honorable James S. Bates, Criminal District Attorney of Hidalgo County, Texas, is the attorney of record for the state and resides at Edinburg, Texas.

WHEREFORE appellant respectfully prays that this motion be granted and the judgment affirming that cause heretofore rendered herein be set aside and the judgment of the court below be in all things reversed.

/s/ B. R. Stewart
Attorney for Appellant
B. R. STEWART
207 E. Harriman St.
Edinburg, Texas

[fol. 40] IN

COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

No. 28,219

(Title Omitted)

MINUTE ENTRY OF ORDER OVERRULING MOTION FOR REHEARING WITHOUT WRITTEN OPINION—June 27, 1956

This cause came on to be heard on Appellant's Motion for Rehearing, and the same being considered, it is ordered, adjudged, and decreed by the Court that said motion be and the same is hereby in all things overruled.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 41] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 42] IN THE

COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS
SITTING AT AUSTIN, TEXAS

I. N. GORDON, *Appellant*

v.

THE STATE OF TEXAS, *Appellee*

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—filed September 21, 1956

Notice is hereby given that I. N. Gordon, the Appellant above named, hereby appeals to the Supreme Court of

the United States from the final order of the Court of Criminal Appeals of the State of Texas, entered on the 27th day of June, 1956 affirming the judgment of conviction of this appellant by the County Court at Law of Hidalgo County, Texas.

This appeal is taken pursuant to 28 U. S. C. A. Section 1257 paragraph 2.

Appellant was convicted of the Crime of possession of unstamped liquor in violation of Article 666-21, Article 666-17 Section 13, Article 666-3A Section 4 of the Vernon's Annotated Penal Code of the State of Texas; was sentenced to pay a fine of One Hundred Dollars ($100.00) and is presently enlarged on recognizance in the sum of Two Hundred and Fifty Dollars ($250.00).

II.

The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

(1) Original complaint and information filed in this cause.
(2) Defendant's First Amended Motion to dismiss complaint and information.
(3) Defendant's Motion to quash complaint and information.
(4) Charge of the County Court of Law to the Jury.
(5) Judgment of the County Court of Law, Hidalgo County, Texas.
(6) Defendant's Bills of Exceptions No. I-II-III-&-IV.
(7) Judgment of the Court of Criminal Appeal of the State of Texas, dated May 23, 1956.

(File Endorsement Omitted)

[fol. 43] (8) Defendant's Motion for re-hearing.

(9) Order of the Court of Criminal Appeal of the State of Texas, over-ruling Defendant's motion for re-hearing entered the 27th day of June, 1956.

III.

The following questions are presented by this appeal:

(1) The tax forming the whole basis for the complaint, information and prosecution of appellant in this cause was void being an unconstitutional tax under Article 1, section 10, clause 2, (the export-import clause) of the Constitution of the United States of America. Such tax is a tax by a state on goods imported into the continental limits of the United States from a foreign country, which said goods imported were still in the original package in which they were purchased, and in the hands of the original importer. Such tax, being void and unconstitutional, could not support a complaint, information or prosecution against the defendant charging possession of untaxed or unstamped liquor.

(2) The tax forming the whole basis of the complaint, information and prosecution of Appellant was void bing an unconstitutional tax under Article 1, section 8, clause 3, (the Commerce Clause) of the Constitution of the United States of America. Such tax is a tax on goods moving through the State of Texas in interstate commerce. Such tax being void and unconstitutional could not support a complaint, information or prosecution against the defendant charging possession of untaxed or unstamped liquor.

/s/ B. R. Stewart
B. R. Stewart
Attorney for I. N. Gordon,
Appellant
207 East Harriman
Edinburg, Texas.

Proof of Service (Omitted in printing)

[fol. 44]

SUPREME COURT OF THE UNITED STATES

Order Noting Probable Jurisdiction—Jan. 28, 1957

Appeal from the Court of Criminal Appeals of the State of Texas.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the appellate docket as No. 718.

January 28, 1957

[fol. 46]

SUPREME COURT OF THE UNITED STATES

No. 396 Misc., October Term, 1956

I. N. GORDON, *Appellant*,

vs.

STATE OF TEXAS

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS—January 28, 1957

ON CONSIDERATION of the motion for leave to proceed *in forma pauperis* in this case,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1957 434073 136

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 71

I. N. GORDON, *Appellant*

vs.

STATE OF TEXAS, *Appellee*

Stipulation and Agreement—Filed September 16, 1957

It is stipulated and agreed by and between I. N. Gordon, Appellant, and the State of Texas, Appellee, by and through their respective counsel, that the agreed Statement of Facts, which formed a part of the record in Cause No. 28,219, styled I. N. Gordon, Appellant vs. State of Texas, Appellee, in the Court of Criminal Appeals for the State of Texas, was omitted through accident on the part of Appellant from inclusion in the printed record heretofore filed in this cause. It is further stipulated and agreed that such Statement of Facts is a necessary and material part of the record and both parties respectfully request that such Statement of Facts be made a part of the record herein as a supplemental record.

It is further stipulated and agreed, subject to the approval of this Honorable Court, that Appellee, the State of Texas may file Appellee's brief herein within thirty (30) days from the receipt by the Attorney General of Texas, counsel for Appellee, the State of Texas, a copy of the supplemental printed record containing the Statement of Facts above referred to.

WHEREFORE, premises considered, Appellant, I. N. Gordon and Appellee the State of Texas, pray that this Honorable Court enter its order of approval of this stipulation permitting the Statement of Facts to be made a part of the printed record in this cause and extend the time for filing of the brief on the part of the State of Texas to a period of thirty (30) days following the receipt by Appellee's Counsel, the Attorney General of Texas, of a printed copy of

the supplemental record containing such Statement of Facts.

B. R. STEWART
B. R. Stewart
Attorney for Appellant
2072 Harriman Street
Edinburg, Texas

WILL WILSON
Attorney General of Texas

C. K. RICHARDS
C. K. Richards
Assistant Attorney General
Attorneys for State of Texas
Capitol Station
Austin, Texas

IN THE COUNTY COURT AT LAW
HIDALGO COUNTY, TEXAS

No. CR 1475

THE STATE OF TEXAS

vs.

I. N. GORDON

Statement of Facts—Filed February 3, 1956

Be it remembered that upon the trial of the above entitled and numbered cause, in said court, at the November, 1955 term, the following were the facts and all the facts proved, to-wit:

The evidence presented by the State of Texas herein was as follows: The defendant, I. N. Gordon, entered the United States of America from the Republic of Mexico at the Hidalgo, Texas, port of entry. The defendant together with two companions had in their possession 11 fifth gallons of liquor. The witness, Joe Kolos, an employee of the Texas Liquor Control Board stationed at the International Bridge at Hidalgo, Texas to collect taxes on Alcoholic beverages, testified that he, Kolos, saw the liquor on the U. S. Customs inspection table, and while he, Kolos, was collecting the

tax money due by another person, the defendant was putting the bottles of liquor back into the trunk of defendants car. Mr. Kolos went to the defendant and requested that the defendant pay the stamp tax imposed by the State of Texas on the distilled spirits. The defendant refused to pay the tax stating that the same was unconstitutional. The defendant resisted the efforts of the witness Kolos to take possession of the liquor and to confiscate the same. The defendant left the port of entry at Hidalgo, Texas without paying the stamp tax on the liquor and he retained the liquor in his possession. The defendant was stopped by a State Highway Patrolman near the city limits of McAllen, Texas, a city about seven (7) miles distant from Hidalgo, Texas. The defendant and his two companions were detained by the Texas State Highway Patrolman until three (3) officers of the State Liquor Control Board, John Schilling, district supervisor, Mr. Blakemore, and Mr. Matthews, arrived and took the defendant into custody, searched his car, found and confiscated the liquor. The defendant was returned to the international bridge at Hidalgo, Texas, the defendant was offered another opportunity to pay the stamp tax and he refused to do so, the defendant was then taken to McAllen, Texas to appear before a Justice of the Peace, where he was charged with the offense in this case. In Lieu of making bond, the defendant was placed in the Hidalgo County Jail at Edinburg, Texas. He made bond the next evening about 7:00 p. m. The stamp tax was still unpaid at the time of trial. The liquor was still in the possession of the agents of the Texas Liquor Control Board at the time of trial and was introduced into evidence at the time of trial. No tax stamp was affixed on the bottles nor was there any evidence showing that the tax had been paid affixed to any of the bottles. The liquor introduced into evidence by the State was Bacardi Rum and contained more than one half (½) per cent alcohol by volume.

The three Liquor Control Board agents who testified for the State stated that the Texas Liquor Control Board maintains collection stations only at the Texas Mexican Border crossings for the collection of the tax on liquors from individuals. There are no collection stations located on the Texas-New Mexico border, the Texas-Oklahoma border, the Texas-Arkansas border, or the Texas-Louisiana border.

There is no other place in the State of Texas except on the Texas-Mexican border where an individual person can purchase liquor stamps to place on unstamped liquor. No other or further supervision or control by the State Liquor Control Board is made on a person importing liquor from the Republic of Mexico once the liquor stamp tax has been paid to the State of Texas.

The evidence presented by the defendant, I. N. Gordon, herein was as follows: The defendant and his companions purchased the liquor in question in the Republic of Mexico and was carrying the same with him when defendant and his companions entered the boundaries of the United States of America. The defendant was driving a car with a North Carolina license plate attached thereto. Defendant and his companions had been in the Republic of Mexico over six months. The defendant was cleared by the U. S. Customs office at the international bridge located at the Hidalgo, Texas port of entry. Defendant was requested to pay the Texas Stamp Tax on liquors brought into the State and the defendant refused to pay the tax stating to the Liquor Control Board Officer that the tax on liquor was unconstitutional as to any liquor which he, the defendant, was merely carrying through the State of Texas. The defendant informed the Liquor Control Officer at the international bridge at Hidalgo, Texas, and the other Liquor Control Officers who took him into custody, that he did not intend to use, sell or dispose of the liquor that he possessed while he, the defendant, was in the State of Texas. The defendant further informed the officers of the Liquor Control Board that he was traveling from the Republic of Mexico to his residence in the State of North Carolina; that the defendant was merely intending to carry the liquor through the State of Texas on his journey to the State of North Carolina.

Defendant testified that he bought 12 bottles of liquor in the Republic of Mexico contained in a cardboard box with cardboard dividers between the bottles; that one bottle had been taken from the box in Mexico and 11 bottles of liquor were taken from the cardboard box and placed on the inspection table at the U. S. Customs Office at the International Bridge at Hidalgo, Texas; that the defendant picked up the bottles from the inspection table and put them back

into the box in the trunk of his car; that each of the bottles was in the same condition, and the 11 bottles of liquor were put back in the same cardboard box which was in the same condition as when imported into the United States of America.

The witness Joe Kolos, employee of the Texas Liquor Control Board stationed at the International Bridge to collect taxes on alcoholic beverages, testified that he saw the liquor on the Customs' inspection table, and while collecting the tax money due by another person, the defendant put the bottles of liquor back into the trunk of the car. The witness Joe Kolos testified that he did not see the cardboard box in which the liquor was put by the defendant.

The defendant was released from the Hidalgo County Jail about 7:00 p.m. August 25, 1955. He spent the night in McAllen, Texas with his wife and daughter. The following morning the defendant and two companions left McAllen, Texas to complete his journey to the State of North Carolina. Defendant arrived in North Carolina on August 30, 1955. Defendant returned to Edinburg, Texas for this trial in the month of November, 1955. The liquor was intended for the personal use of the defendant and his companions in the State of North Carolina and was not at anytime intended for resale, use or disposal in the State of Texas. The testimony showed that the defendant was not told by any of the Liquor Control Agents or by the District Attorney that defendant could segregate liquors not intended for sale in the State of Texas and thereby escape payment of the tax. He was only told that he had to pay the tax.

The testimony is undisputed that 11 bottles of liquor were passed by the U. S. Customs Officers; that they notified Mr. Kolos that there were 11 bottles of liquor in defendant's and his companions' possession.

It is stipulated that 11 bottles of liquor were seized by the officers of the Liquor Control Board, one bottle was broken, after being seized; that only eight bottles of rum above described were offered in evidence.

It is hereby agreed that the foregoing is a correct statement of all the facts given in evidence on the trial of said above entitled and numbered cause.

Witness our signatures on this the 26th day of January, A. D. 1956.

J. BATES
Counsel for the State of Texas

B. R. STEWART
Attorney for Defendant

The foregoing statement of facts was submitted to me by the parties, and upon examination of the same I find it correct and approve it, and order the same to be filed by the clerk as a part of the record in said cause.

This the 3rd day of February, A. D. 1956.

TOM L. HARTLEY
Judge
County Court at Law
Hidalgo County, Texas

THE STATE OF TEXAS
COUNTY OF HIDALGO

I, GEO. L. ANDERSON, Clerk of the Conty Court at Law of Hidalgo County, Texas, hereby certify that the above and foregoing instrument is the Original Statement of Facts filed in cause number CR-1475, styled THE STATE OF TEXAS vs. I. N. GORDON and that same is recorded in the Criminal Minutes of Hidalgo County, Texas.

Witness my hand and the seal of said Court at office in Edinburg, Texas, this 7th day of February, A. D. 1956.

GEO. L. ANDERSON,
Clerk County Court at Law,
Hidalgo County, Texas

By ISABEL RAMIREZ, *Deputy*

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FILED
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JOHN T. FEY, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 71

I. N. GORDON,

Appellant,

vs.

STATE OF TEXAS,

Appellee.

APPEALED FROM THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

APPELLANT'S BRIEF

B. R. STEWART
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 71

I. N. GORDON,

Appellant,

vs.

STATE OF TEXAS,

Appellee.

APPEALED FROM THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

BRIEF OF APPELLANT

I.

Official Report of Opinions Below

The Judgment of the County Court at Law, Hidalgo County, Texas, dated November 14, 1955, is recorded in Volume 2, Page 583, of the Criminal Minutes of the County Court at Law, Hidalgo County, Texas.

The Judgment of the Court of Criminal Appeals of the State of Texas was rendered May 23, 1956 (R. 18-21), and re-hearing was denied without written opinion on June 27, 1956 (R. 26), and such opinions of the Court of Criminal Appeals are not yet officially reported in the Reporter System.

II.

Jurisdiction

Jurisdiction of the Court is invoked under Section 1257, Paragraph 2, Volume 28, of the United States Code Annotated. Notice of appeal was filed September 21, 1956, which was within ninety days from the overruling motion for re-hearing dated June 27, 1956, such appeal being taken within the time allowed under rules 10 and 11, of the Supreme Court Rules. The Supreme Court of the United States noted probable Jurisdiction on January 28, 1957, and granted leave for appellant to proceed *in forma pauperis* on January 28, 1957.

III.

Statutes and Constitutional Provisions Involved in Appeal

The Constitutional provisions and statutes, which are involved in this appeal, are as follows, to-wit:

Article 666-3a, Sections 1, 3 and 4, pages 194, and 195
Article 666-12, Section 13, page 323
Article 666-21, Pages 29 and 30 of the 1956 Cumulative Annual Pocket part of the Volume 1A of the Penal Code.
Article I, Section 10, Clause 2, United States Constitution
Article I, Section 8, Clause 3, United States Constitution
Paragraph 1798, Section 1201, 19 United States Code Annotated

The complete text of the above mentioned statutes and constitutional provisions are copied at length and attached hereto as Appendix No. I.

IV.

Questions Presented for Review

The State of Texas has sought, by virtue of criminal prosecution of appellant for possession of untaxed or unstamped liquor, to make appellant pay the Texas State Liquor Tax Stamp on liquor purchased in the Republic of Mexico and which appellant was carrying through the State of Texas to the State of North Carolina. Appellant, in due time, presented his Motion to Dismiss the Complaint and Information (R. 2-4), his sworn Motion to Quash Complaint and Information (R. 4-6), Motion for Instructed Verdict (R. 14) and the written request for Instructions to the Jury (R. 15-18), to the County Court at Law, Hidalgo County, Texas, the Court of the first instance. It was contended by appellant in each of the above motions or requests, that the tax was repugnant to the Constitution of the United States. The contentions supporting such a position by the appellant are listed as follows, to-wit:

1. Appellant contends that such a tax as was sought to be imposed on the liquor in his possession by the State of Texas was such a tax as is prohibited by Article I, Section 10, Clause 2 (export and import clause) of the Constitution of the United States. Such a tax, is a tax, by a State on goods imported into the Continental limits of the United States from a foreign country which said goods imported were still in the original package in which they were purchased and in the hands of the original importer, and which said goods had not become a part of the general mass of goods of the State of Texas. Such tax being unconstitutional, was void, and not due the State of Texas, and could not support a prosecution of this appellant, charging possession of untaxed or unstamped liquor.

2. Appellant contends that such a tax as was sought to be imposed on the liquor in his possession by the State of Texas was such a tax or interference as is prohibited by Article I, Section 8, Clause 3 (the commerce clause) of the Constitution of the United States of America. Such tax, is a tax, on goods moving through the State of Texas in interstate commerce and which said goods were not intended for delivery or use in the State of Texas. Such tax being unconstitutional and not due the State of Texas, and could not support a prosecution of this appellant charging possession of untaxed or unstamped liquor.

V.

Concise Statement of Case

1. The appellant, his wife and daughter, residents of the State of North Carolina, entered the United States after an extended visit in the Republic of Mexico (R. 34), having in their possession liquor which they had purchased in the Republic of Mexico (R. 34). Such liquor was bought for consumption and use by appellant, his wife and daughter, and they intended to carry the same with them to the state of their residence, North Carolina. The appellant, his wife and daughter, did not intend to use, sell, dispose or deliver such liquor in the State of Texas (R. 35), and they so stated to the Texas officers (R. 34). Officers of the Texas Liquor Control Board sought to make appellant, his wife and daughter, pay a Texas State Liquor Tax on such liquor; appellant, his wife and daughter, refused to pay such tax saying that it was unconstitutional as to them and the liquor they were carrying (R. 34). Appellant, only, was arrested and charged with the offense of possession of an illicit alcoholic beverage in a container to which a Texas Tax Stamp had not been affixed, tried and convicted of such offense and was fined $100.00, plus Court costs (R.

33). The State of Texas maintains liquor stamp collection stations only at the Texas-Mexican border crossings, and there is no other place in the State of Texas where an individual can purchase liquor stamps to place on unstamped liquor (R. 33-34). The liquor brought into the United States by appellant, his wife and daughter, was still in the original container in which it was imported and had not passed from the control of the appellant, his wife or daughter, and had not become a part of the general mass of goods of the State of Texas (R. 35).

VI.

Argument

Appellant would show the Court that, in the various stages in the County Court at Law of Hidalgo County, Texas, and the Court of Criminal Appeals of the State of Texas, he duly presented his objections to the tax sought to be imposed on him for the reason that the tax was violative of the Commerce Clause and the Export and Import Clause of the United States Constitution. It is felt that the lower courts erred in not sustaining his contentions and the argument presented hereby to the Supreme Court is restricted to the constitutional questions.

Point I Restated

Appellant contends that such a tax as was sought to be imposed on the liquor in his possession by the State of Texas was such a tax as is prohibited by Article I, Section 10, Clause 2 (export and import clause) of the Constitution of the United States. Such a tax, is a tax, by a state on goods imported into the Continental limits of the United States from a foreign country which said goods imported

were still in the original package in which they were purchased and in the hands of the original importer, and which said goods had not become a part of the general mass of goods of the State of Texas. Such tax being unconstitutional, was void, and not due the State of Texas, and could not support a prosecution of this appellant, charging possession of untaxed or unstamped liquor.

Argument on Point I

The Constitution of the United States of America provides as to control of exports and imports into the United States as follows:

> Article I, Section 10, Clause 2: *No state shall,* without the consent of the Congress, *lay any Imposts or Duties on Imports or Exports,** except what may be absolutely necessary for executing its inspection laws; and the net produce of all Duties and Imposts, laid by any State on Imports or Exports shall be for the use of the Treasury of the United States and all such laws shall be subject to the revision and control of the Congress.

This provision of the Constitution was placed therein by the founding fathers of this country to eliminate the specific evil, that existed under the Continental Congress, of the various states imposing conflicting taxes on imports and exports with the resultant stifling of foreign trade. It was decided by the makers of the Constitution that the control of foreign trade should be vested in the central government so as to establish a uniform policy therefore for the entire

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* Emphasis added.

nation, and so that the interior states would not be at a disadvantage in comparison to the coastal or border states.

This provision of the Constitution was perhaps first interpreted in the case of *Brown* v. *Maryland*, 12 Wheat. 419, 25 S.C. 41º in the year 1827. Chief Justice John Marshall delivered the opinion of the court and set us the "original package" doctrine to define the limits where Federal control over imports ends and where the authority of the states begin. Chief Justice Marshall set up this doctrine in this language, page 439.

> "The constitutional prohibition of the states to lay a duty on imports—a prohibition which a vast majority of them must feel an interest in preserving—may certainly come in conflict with their acknowledged power to tax persons and property within their territory. The power, and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in making the distinction between them. Yet the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application. It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution."

The Chief Justice continues at page 448.

"It has been observed, that the powers remaining with the states may be so exercised as to be in conflict with those vested in Congress. When this happens, that which is not supreme must yield to that which is supreme. This great and universal truth is inseparable from the nature of things, and the constitution has applied it to the often interfering powers of the general and state governments, as a vital principle of perpetual operation. It results, necessarily, from this principle, that the taxing powers of the states must have some limits. It cannot reach and restrain the action of the national government within its proper sphere.... These cases are all within the sovereign power of taxation, but could obviously derange the measure of Congress to regulate commerce and affect materially the purpose for which that power was given."

The *Brown* v. *Maryland* case involved a state statute of the State of Maryland requiring of importers of foreign articles a license before they could sell the same in the State of Maryland. The instant case involved an importer of a bale of dry goods who had sold the same in its original package without first obtaining a license. The Maryland statute included, among others, importers of wine, rum, brandy, whiskey and other distilled spirituous liquors and the court made no distinction as to the class of articles to be protected by the export-import clause in setting forth its ruling.

The next cases that interpreted this clause were the "License Cases" 46 U.S. 504, 5 How. 256 decided by the Supreme Court in the year 1847. These three cases were brought to the Supreme Court from the states of New Hampshire, Massachusetts and Rhode Island and involved

three separate town council ordinances requiring a license from the council before any liquor could be sold in the town in small lots. Each of the defendants was arrested for not having a license and fined. The justices of the court each wrote separate opinions in the cases. Mr. Chief Justice Taney, who argued for the State of Maryland in *Brown* v. *Maryland*, recognized the wisdom of the decision of the Court in the *Brown* case and said in connection therewith at page 574.

> "A tax in any shape upon imports is a tax on the consumer, by enhancing the price of the commodity. And if a State is permitted to levy it any form, it will put it in the power of a maritime importing State to raise revenue for the support of its own government from citizens of other states, as certainly and effectually as if the tax was laid openly and without disguise as a duty on imports. Such a power in a State would defeat one of the principal objects of forming and adopting the Constitution. It cannot be done directly, in the shape of a duty on imports, for that is prohibited. And as it cannot be done directly, it could hardly be a just and sound construction to accomplish precisely the same thing under another name, and in a different form."

Mr. Justice Catron in a separate opinion had this to say at page 600.

> "Had the gin imported been an import from a foreign country, then the license law prohibiting its sale by the importer would be void."

At page 609 Mr. Justice Catron says,

> "But while foreign liquors, imported according to the regulations of Congress remain the cask, bottle, etc., in the original form, the importer may sell them in that

form at the port of entry, or in any other part of the United States, nor can any State law hinder the importer from doing so; nor does it make any difference whether the imported articles paid a tax on its introduction or was admitted as a free article; until it passes from the hands of the importer, it is 'an import', and belongs to regulated 'foreign commerce' and is protected."

The court sustained the convictions of the three defendants but did so on the grounds that none of them were the original importers from abroad of the liquor sold.

The "original package" doctrine has been followed by the Supreme Court from the date of the *Brown* case to this. One of the latest expressions of the Supreme Court concerning this original package doctrine was in *Hooven & Allison Company* v. *Evatt*, 324 U.S. 652, 65 S.Ct. 870, decided April 9, 1945. This case involved an *ad valorem* tax by the State of Ohio on hemp and rope material imported from abroad by petitioners and stored in their warehouse in Xenia, Ohio. The imported materials were still in their original package but had not been put to use in manufacture of rope at the time that the assessment was made by the State of Ohio. The Supreme Court reviewed all the cases on imports and said, page 879,

"Although one justice dissented in Brown v. Maryland, supra, from that day to this, this court has held, without a dissenting voice, *that things imported are imports entitled to the immunity conferred by the constitution; that that immunity survives their arrival in this country and continues until they are sold, removed from the original package, or put to the use for which they are imported.** (Citing cases.)

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* Emphasis added.

The court held in the *Hooven & Allison* v. *Evatt* case that the imported article was not subject to taxation by the state until it had become incorporated in the general mass of goods of the state by being used in the manufacture of the goods for which it was intended. See also *Leisey* v. *Hardin*, 10 S.C. 681, 135 U.S. 100.

The above cases abundantly support the position of the appellant herein for the reason that he purchased the liquor in question in the Republic of Mexico. The liquor was imported into the United States by him and it was still in his possession in the original package in which it was imported at the time of the appellant's arrest (R. 34 and 35). Under the cases the appellant had the right to carry the liquor with him to his destination without taxation by the State of Texas or by any state that he might pass through to reach his destination. The Texas State Liquor Tax imposed was void. Such tax being void, the whole prosecution of the appellant must fall.

The Congress of the United States has acted with reference to imports of liquors by individuals into the United States by virtue of the Customs Act in 19 U.S.C.A. Section 1201, which says,

> "Except as otherwise especially provided for in this chapter, the articles mentioned in the following paragraphs, *when imported into the United States* or into any of its *possessions shall be exempt from duty.**
>
> Paragraph 1798
>
> (c) In the case of *any person** arriving in the United States who is a returning resident thereof—
>
> (2) articles *including not more than one wine gallon of alcoholic beverages** and not more than one hun-

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* Emphasis added.

dred cigars, acquired abroad as an incident of the journey from which he is returning, for his personal or household use, but not imported for the account of any other person nor intended for sale, if declared in accordance with the regulations of the Secretary of Treasury."

Here, then, by the very action of the Congress, the appellant has been included within the scope of importers protected under Article I, Section 10, Clause 2, of the Constitution. The appellant is allowed to bring into the United States one gallon of alcoholic beverages for his own personal use free of duty. The Congress having acted, any action by the State in the same field must yield to the supremacy of Congressional action by virtue of the Supreme Law of the Land Clause in the Constitution.

The appellant is not unmindful of the fact that the State will contend that the 21st amendment to the Constitution, changed this right of freedom of import with reference to intoxicating liquors. This question was resolved by the Supreme Court of the United States in *William Jameson Co., Inc.* v. *Morgenthau, Jr.*, 307 U.S. 171, 59 S.Ct. 804, decided in May 15, 1939. The case involved a liquor importer who contested the validity of the Federal Alcohol Administration Act and maintained that by virtue of the Twenty-first Amendment the control over intoxicating liquors was given to the several states. The Supreme Court overruled this contention saying, 59 S.Ct. 805,

"Here, the Federal Alcohol Administration Act was attacked upon the ground that the 21st amendment to the Federal Constitution, U.S.C.A., gives to the States complete and exclusive control over commerce in intoxicating liquors, unlimited by the commerce clause and hence that Congress has no longer authority to control

the importation of these commodities. We find *no substance** in this contention."

In the case of *C. Adolph Low, et al.* v. *Alexander Austin*, 80 U.S. 517, 13 Wall. 29, decided January 29, 1872, the Supreme Court of the United States was concerned with an *ad valorem* tax imposed by the City of San Francisco on an importer of wines from France. The custom duties and import taxes imposed by the United States were paid on the wine and then the wine was stored in the warehouses of the plaintiff located in the City of San Francisco. The City imposed an *ad valorem* tax on the wines which the plaintiff paid under protest and sued to recover. The trial court held for the plaintiffs, this was reversed by the California Supreme Court and the California Supreme Court was in turn reversed by the United States Supreme Court. The Supreme Court, speaking through Mr. Justice Field, said, page 519,

> "The Supreme Court of California appears from its opinion, to have considered the present case as excepted from the rule laid down in Brown v. Maryland, because the tax levied is not directly upon imports as such, and, consequently the goods imported are not subject to any burden as a class, but only are included as part of the whole property of its citizens which is subjected equally to an ad valorem tax. But the obvious answer to this position is found in the fact, which is, in substance, expressed in the citations made from the opinions of Marshall and Taney, and that the goods imported do not lose their character as imports, and become incorporated into the mass of property of the state, *until they have passed from the control of the importer or been broken up by him from their original*

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* Emphasis added.

*cases. Whilst retaining their character as imports, a tax upon them in any shape, is within the constitutional prohibition.** The question is not as to the extent of the tax, or its equality with respect to the taxes on other property, but as to the power of the state to levy any tax. . . . Imports, therefore, whilst retaining their distinctive character as such, must be treated as being without the jurisdiction of the taxing power of the State."

In the very recent case of *Parrott & Company* v. *City and County of San Francisco*, 280 P.2 881, decided by the California Court of Appeal on March 8, 1955, the same situation as in the *Low* v. *Austin, supra*, was considered and decided adversely to the local taxing authorities. This is a well reasoned opinion and reviews all the decisions concerning the rights of importers to bring liquor in free from taxation from the state until it has become incorporated in the general mass of the community. See also *Von Hamm Young Company* v. *City and County of San Francisco*, 178 P.2 745, decided by the Supreme Court of California, March 14, 1947.

For support of the contention that the tax involved in this case is purely an import tax, attention is directed to the statement of facts. It is uncontroverted in the statement of facts that the State of Texas maintains tax collection stations only on the Texas-Mexican Border, that none are maintained on any other borders of states adjacent to Texas (R. 33). Further and beyond that, the statement of facts shows that there is no other place in the State of Texas where an individual in possession of unstamped liquor can purchase the tax stamps except on the Mexican Border (R. 34). These two facts fully support the view

* Emphasis added.

that the tax stamp is enforced purely as a revenue raising import tax.

Appellant has been unable to find any Texas cases where the issue was raised as to the validity of a tax being placed on imports from a foreign country.

To review the foregoing law as applied to the appellant herein; the appellant brought his liquor into the continental limits of the United States after purchasing the same in a foreign country, to-wit: the Republic of Mexico (R. 32 and 34). The liquor was an import still in the hands of the appellant who imported it. It was in the same bottles as when imported (R. 35). This is sufficient to bring the appellant and his liquor within the rule of *Brown* v. *Maryland*, *supra*, and the cases following, but in this instance, Congress has gone further and legislated on the matter of importing liquor by a person in appellant's position. It has allowed them to bring in one gallon of alcoholic beverages, duty free, of any import tax by the United States, so long as the liquor is for the personal use of the person importing the liquor. The statement of facts shows that it was uncontroverted that the liquor brought in by the appellant was intended for his own personal use and was not for sale, use or disposition in the State of Texas (R. 35). This being true, the liquor could never become a part of the general mass of commodities in the state or be subject to taxation by the State of Texas. It matters not that the state tax is uniform as to all liquor in the State, the attempted tax on liquor brought in from the Republic of Mexico is void because it is laid in direct contravention of the prohibition of Article I, Section 10, Clause 2, of the United States Constitution. The tax being void, the appellant is not guilty of the offense of possession of unstamped liquor and the prosecution must fail for lack of an offense.

Point II Restated

Appellant contends that such a tax as was sought to be imposed on the liquor in his possession by the State of Texas was such a tax or interference as is prohibited by Article I, Section 8, Clause 3 (the commerce clause) of the Constitution of the United States of America. Such tax, is a tax on goods moving through the State of Texas in interstate commerce and which said goods were not intended for delivery or use in the State of Texas. Such tax, being unconstitutional and not due the State of Texas, could not support a prosecution of this appellant charging possession of untaxed or unstamped liquor.

Argument on Point II

This ground for reversal is based on the principle that no state can impose a tax on an article that is moving in interstate or foreign commerce. For some cases setting forth this doctrine see *Heyman v. Hays*, 35 S.C. 403, decided in 1915; *McLeod v. J. E. Dilworth Co.*, 64 S.C. 1023, decided in 1944; and *Michigan Wisconsin Pipeline Co.* v. *Calvert, et al.*, 74 S.C. 396, decided on February 8, 1954. This latter case was from Texas and decided that a taking tax on natural gas was an undue burden on interstate commerce.

The question first arises as to whether this appellant was engaged in interstate commerce at the time of his arrest. This question was settled by the Supreme Court of the United States in the case of *United States* v. *Simpson*, 252 U.S. 465, 40 S.C. 364. The Court held that an individual driving his car and carrying five quarts of whiskey for his own use and enjoyment was operating in interstate commerce when he crossed a state line carrying the liquor.

He was convicted under a Federal statute forbidding transportation of liquor into a state that forbade the manufacture and sale of liquor. The conviction was upheld by the Supreme Court.

The next question that arises is whether the Twenty-first Amendment to the Constitution of the United States changes the rule on goods moving in interstate commerce in so far as intoxicating liquors are concerned. The 21st amendment and the interstate commerce clauses are set forth below:

> *Article I, Section 8, Clause 3*: "The congress shall have power . . . to regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes."
>
> *The Twenty-first Amendment*: Section 1 The eighteenth amendment to the Constitution of the United States is hereby repealed.
>
> Section 2. The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The conflict between the Interstate Commerce Clause and the Twenty-first Amendment has been the subject of many opinions by the Supreme Court of the United States. One of the most recent is a 1944 case, *Carter* v. *Commonwealth of Virginia*, 64 S.C. 464, wherein the defendants were convicted fo. not complying with a regulatory measure by the State of Virginia over intoxicating liquors transported through the State of Virginia. The majority opinion of the Court says, page 468,

> "Whatever may be the effect of the Twenty-first Amendment, this record presents no problem that may not be resolved under the commerce clause alone. That Clause remains in the Constitution as a grant of power

to Congress to control commerce and as a diminution pro tanto of absolute state sovereignty over the same subject matter. The twenty-first amendment limits that grant of power as to intoxicating liquor by prohibiting 'transportation or importation into any State, Territory, or possession of the United States *for delivery or use therein** . . . in violation of the laws thereof. By interpretation of this court, the amendment has been held to relieve the states of the limitations of the commerce clause on their powers over such transportation or importation. *It has also been held that shipment through a state is not transportation or importation into the state within the meaning of the amendment.*" Collins v. Yosemite Park Co., 304 U.S. 518, 58 S.C. 1009. But in the present case we need not consider the power of Virginia under the twenty-first amendment to regulate through shipments. It is enough that Virginia could conclude, *in the absence of contrary Federal Legislation,** that she could not safely permit the transportation of liquor through her territory by those who concededly mean to break Federal laws and the rules of a neighboring state."

Mr. Justice Frankfurter concurred in the result of the case but would have based the decision on the Twenty-first Amendment. Granted, he sets forth some strong language in the favor of the Twenty-first Amendment, however, his reasoning was not adopted as the majority opinion.

The Supreme Court in *Collins* v. *Yosemite Park Co.*, 304 U.S. 518, 58 S.C. 1009, considered an injunction suit by the Yosemite Park Co., against the administrators of the Alcoholic Beverage Control Act of California to prevent them from enforcing the same within the confines of the Park.

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* Emphasis added.

The Court said that the taxation and regulatory parts of the act were separable and upheld the injunction against the regulations enforcement as an attempt to regulate liquor outside of the jurisdiction of the State of California. The Supreme Court allowed the tax portion of the Alcoholic Beverage Control Act *only** because the state had reserved the right to tax in the instrument ceding jurisdiction of the Yosemite Park area to the United States. The Court said, page 1017,

> "the excise tax imposed on the sale of liquor in the state is separable from the licensing or regulatory provisions of the Alcoholic Beverage Control Act and may be enforced independently as purely a tax or revenue measure."

The Court further said, page 1018,

> "The lower court was of the opinion that though the amendment (Twenty-first amendment) may have increased the State's power to deal with the problem . . . it did not increase its jurisdiction." With this conclusion we agree. As territorial jurisdiction over the park was in the United States, the state could not legislate for the area merely on the account of the Twenty-first amendment. *There was no transportation into California "for use and delivery therein."** The delivery and use is in the Park and under a distinct sovereignty. Where exclusive jurisdiction is in the United States without power in the State to regulate alcoholic beverages, the 21st Amendment is not applicable."

The important part of the above case is the fact that the Supreme Court recognized the separability of the taxing and the regulatory phases of the California Alcoholic Beverage Control Act, and that the Court would not have upheld

* Emphasis added.

the tax part of the act had it not been that for the reservation of the right to tax by the State of California in the ceding instrument.

Recognizing that there are numerous other cases by the United States Supreme Court concerning intoxicating beverages and the rights of the various states to control the traffic within their own borders, appellant states that the cases are all distinguishable. The cases were either concerned with the control of alcoholic beverages transported or imported into the state for delivery or use therein; or they were concerned with the regulation of the transit through the state to prevent an evasion of local laws. So far as the appellant is concerned, as shown by the statement of facts, the liquor he was carrying was not for delivery or use in the State of Texas but was merely in transit through the State (R. 34). The tax sought to be imposed by the State of Texas was a pure revenue measure and could not be considered to be a regulation of transit through the state to prevent an evasion of the local laws. As shown by the statement of facts, the State of Texas only attempted collection of the tax at the border crossing on the Texas-Mexican Border and that no collection is attempted by the State of Texas on any of its other borders (R. 33).

It is further shown that once the tax is paid by a person bringing liquor into Texas from Mexico, there is no control or supervision by the State at any other point (R. 34). This would lead to the conclusion that the collection of the tax is merely for revenue and not as a regulatory measure.

In *Von Hamm Young Co. Ltd.* v. *City and County of San Francisco,* 178 P.2 745, the Court was concerned with a suit by the plaintiff for return of taxes assessed by the local taxing authorities on goods, including intoxicating liquors, moving through the port of San Francisco to Hawaii. The Court held that the goods were not subject to local taxation

as they were in interstate commerce. The opinion of the California Supreme Court rendered in 1947 was unanimous and said,

> "Defendant also contends that the property tax, even if it did not apply to the bulk of the property in transit, applies to the plaintiff's intoxicating liquor stored in the San Francisco warehouses on tax day, on the ground that under the 21st amendment to the Federal Constitution the state may regulate interstate traffic in alcoholic beverages. The 21st amendment merely prohibits the importation of intoxicating liquors into a state 'for delivery or use therein . . . in violation of the laws thereof.' . . . Defendant relies on the concurring opinions in Duckworth v. State of Arkansas, 314 U.S. 390, 397, 62 S.C. 311; and Carter v. Commonwealth of Virginia, 321 U.S. 131, 139, 64 S.C. 464, 88 D.Ed. 605. These opinions were concerned, not with the taxation of property in transit, but with the regulation of such transit to prevent evasion of local laws. Moreover, the majority opinion in both cases rejected the view that the 21st amendment was applicable to the transportation of alcoholic beverages through a State. See, also Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 386, 64 S.C. 622, 88 L.Ed. 814; and cases collected in 84 L.Ed. 137; 55 Yale Law J. 815."

See also *State of Georgia* v. *Wenger*, 187 P.2 285, cert. denied 72 S.C. 41, rehearing denied 72 S.C. 105; *Alcohol Division of Tenn.* v. *State ex rel. Strawbridge* (1953), 63 S.2 358, by the Supreme Court of Alabama.

So let us consider the cases as they affect this appellant. Appellant was admittedly carrying intoxicating liquors and he crossed a state line, therefore he would come within the definition of *United States* v. *Simpson, supra,* and be con-

sidered as being in interstate commerce. Is the portion of the Texas Liquor Control Act that the appellant is accused of violating a regulatory measure or a revenue measure? Obviously, it is a revenue measure as the whole offense depends on whether the appellant has purchased liquor stamps and affixed them on the bottles of liquor which he brought in from Mexico; nothing else is asked of the appellant than to pay and place them on the bottle. Since it is a tax we are concerned with, the tax is not to be sustained simply because it is a part of a general regulatory statute, the taxing portion is severable from the regulatory portion of the statute under the reasoning of *Collins* v. *Yosemite Park Co., supra,* further, by virtue of the *Collins* case the tax on interstate commerce cannot stand as there is no agreement between the Federal Government and the State of Texas authorizing the State to impose a purely revenue raising tax on liquors moving through the state in interstate commerce. In fact, the Federal Government rather than giving the state additional freedom to act has actually restricted the states by the Congressional action in passing the Customs Act, Section 1201, Paragraph 1798, (c), (2), which allows the liquor to come into the continental limits of the United States free of any duty or tax. The fact that the Federal Congress has acted would further bring the tax sought to be imposed on the appellant within the rule set up in *Carter* v. *Commonwealth of Virginia,* which says that the state action can stand only in the absence of prior Federal action. The appellant, coming within all of the above classifications, the State of Texas could not impose a tax on the liquor he was carrying through the state. Such tax not being due to the State of Texas, the prosecution of this appellant for possession of unstamped liquor must be void at its inception and the trial court should have dismissed the prosecution when the matters above related were brought to its attention.

CONCLUSION

It is therefore respectfully submitted that this Court should reverse the decision of the Court of Criminal Appeals of the State of Texas, and dismiss the prosecution against this appellant.

Respectfully submitted,

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APPENDIX No. I

ARTICLE 666-3a. Definitions

The following definitions of words and terms shall apply as used in this Act:

(1) "Alcoholic Beverage" shall mean alcohol and any beverage containing more than one-half of one per cent (½ of 1%) of alcohol by volume which is capable of use for beverage purposes, either alone or when diluted.

(3) "Distilled Spirits" shall mean alcohol, spirits of wine, whiskey, rum, brandy, gin and any liquor produced in whole or in part by the process of distillation, including all dilutions and mixtures thereof.

(4) "Illicit Beverage" shall mean and refer to any alcoholic beverage manufactured, distributed, bought, sold, bottled, rectified, blended, treated, fortified, mixed, processed, warehoused, stored, possessed, imported, or transported in violation of this Act, or on which any tax imposed by the laws of this State has not been paid and the tax stamp affixed thereto; and any alcoholic beverage possessed, kept, stored, owned, or imported within intent to manufacture, sell, distribute, bottle, rectify, blend, treat, fortify, mix, process, warehouse, store or transport in violation of the provisions of this Act.

ARTICLE 666-17 Section 13

(13) It shall be unlawful for any person to have in his possession, transport, manufacture, or sell any illicit beverage.

ARTICLE 666-21 Fees and Taxes

There is hereby levied and imposed on the first sale in addition to the other fees and taxes levied by this Act the following:

The term "first sale" as used in Article I of this Act shall mean and include the first sale, possession, distribution, or use in this State of any and all liquor refined, blended,

manufactured, imported into, or in any other manner produced or acquired, possessed or brought into this state.

The tax herein levied shall be paid by affixing a stamp or stamps on each bottle or container of liquor. Said stamps shall be affixed in strict accordance with any rule or regulation promulgated in pursuance of this Act; provided, however, any holder of a permit as a retail dealer as that term is defined herein shall be held liable for any tax due on any liquor sold on which the tax has not been paid.

It shall be the duty of each person who makes a first sale of any liquor in this State to affix said stamps on each bottle or container of liquor and to cancel the same in accordance with any rule and regulation of the Board. The Board shall have power to relax the foregoing provision when in its judgment it would be impracticable to require the affixing of such stamp on the bottle or container, irrespective of any other provision of this Act. And any person, or persons, or association who violates any portion of this Section shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than One Hundred Dollars ($100.00) nor more than One Thousand Dollars ($1,000.00), or by imprisonment in the County Jail for not less than thirty (30) days nor more than one (1) year. Every holder of a permit authorizing the wholesaling of liquor, upon receipt of a shipment of liquor for sale within this State, under the provisions of this Act, shall prepare and furnish such information and such reports as may be required by rules and regulations of the Board. Any person authorized to export liquor from this State having in his possession any liquor intended for shipment to any place without the State, shall keep such liquors in a separate compartment from that of liquors intended for sale within the State so that the same may be easily inspected and shall attach to each such package of liquor so intended for shipment without the State a tax stamp of the kind and character that shall be required by proper rule or regulation denoting that the same is not intended for sale within the State. When such liquors are so kept and so stamped no tax on account thereof shall be charged. For defraying the expenses thereof, a charge of Twenty-five (25¢) cents shall be made for every

such stamp, except that a charge of Ten (10) cents shall be made for each such stamp placed on vinous or malt liquors of twenty-four per cent (24%) alcoholic content or less. All such permitees authorized to transport liquor beyond the boundaries of this State shall furnish to the Board duplicate copies of all invoices for sale of such liquors, within twenty-four (24) hours after such liquors have been removed from their place of business.

ARTICLE I, Section 8, Clause 1

The Congress shall have power to lay and collect Taxes, Duties, Imposts and Excises, to pay the debts and provide for the Common Defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.

Clause 3

To regulate Commerce with foreign nations, and among the several states, and with the Indian Tribes.

ARTICLE I, Section 10, Clause 2

No state shall, without the consent of the Congress, lay any imposts or duties on Imports and Exports, except that which may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on Imports and Exports shall be for the use of the Treasury of the United States and all such laws shall be subject to the revision and control of the Congress.

AMENDMENT XXI Repeal of XVIII Amendment

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several states, as provided in the Con-

stitution, within seven years from the date of submission hereof to the States by the Congress.

CUSTOMS DUTIES

19 United States Code Annotated, Section 1201

Except as otherwise specially provided for in this chapter, the articles mentioned in the following paragraphs, when imported into the United States or into any of its possessions shall be exempt from duty.

Paragraph 1798

(c) In the case of any person arriving in the United States who is a returning resident thereof—

(1) All personal and household effects taken abroad by him or for his account and brought back by him or for his account; and

(2) articles (including not more than one wine gallon of alcoholic beverages and not more than one hundred cigars) acquired abroad as an incident of the journey from which he is returning, for his personal or household use, but not imported for the account of any other person nor intended for sale, if declared in accordance with regulations of the Secretary of Treasury.

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No. 71

IN THE

Supreme Court of the United States

SEPTEMBER TERM, 1957

I. N. GORDON,
Appellant,

v.

THE STATE OF TEXAS
Appellee.

BRIEF OF APPELLEE

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I. N. GORDON,
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THE STATE OF TEXAS
Appellee.

BRIEF OF APPELLEE

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

I.

OPINION OF THE COURT BELOW

The judgment of the Court of Criminal Appeals of the State of Texas was rendered on May 23, 1956, (R. 22) and rehearing denied June 27, 1956. (R. 26). The opinion of the Court of Criminal Appeals of the State of Texas has not yet been officially re-

ported, but is set out in full in the Transcript of Record. (R. 18-21).

CONCISE STATEMENT OF THE FACTS

Appellant, accompanied by his wife and daughter, entered the United States from the Republic of Mexico at the port of entry at Hidalgo, Texas, at which time he had in his possession eleven fifth-gallons of rum, each of which contained more than one-half of one (½ of 1%) percent alcohol by volume, which had been purchased in the Republic of Mexico. (R. 32-33). An agent of the Texas Liquor Control Board requested appellant to pay the tax imposed by the State of Texas on the liquor and that a stamp evidencing such payment be affixed to the bottles, the payment of which was refused by appellant and his arrest followed. Appellant refused to pay the tax due the State of Texas, contending that such tax was unconstitutional as to any liquor which appellant was merely carrying through the State of Texas. (R. 33-34). Appellant was arrested and charged with the possession of an illicit alcoholic beverage containing more than one-half of one per-cent of alcohol by volume upon which the tax due to the State of Texas had not been paid. (R. 1). Appellant testified at the trial that he had purchased the rum in the Republic of Mexico intending to carry it through the State of Texas upon his journey to the State of North Carolina where it was intended for the personal use of the appellant and his companions, and was not at any time intended for resale, use, or disposal in the State of Texas. At the time he was arrested ten fifth-gallons were in the

original packages, one bottle having been broken after seizure by officers of the Liquor Control Board. (R. 34-35). Appellant was tried by a jury which found him guilty of the possession of an illicit alcoholic beverage not contained in a container to which was affixed a tax stamp or other evidence showing the payment of taxes due the State of Texas and fined $100.00. (R. 9-11). Upon appeal to the Court of Criminal Appeals of the State of Texas the judgment of the County Court of Law of Hidalgo County, Texas, was affirmed. (R. 22).

APPELLEE'S COUNTERPOINTS

1. The tax in question which was levied upon intoxicating liquor unlawfully possessed by appellant within the State of Texas did not contravene Article I, Section 10, Clause 2 (the Export-Import Clause) of the Constitution of the United States, since it was not a tax or duty on the importation of goods into the continental limits of the United States from a foreign country. (In reply to Appellant's Contention No. 1).

2. The tax in question, being based upon the unlawful possession of intoxicating liquor within the State of Texas, did not contravene Article 1, Section 8, Clause 3 (the Commerce Clause) of the Constitution of the United States, since, under the laws of the State of Texas, appellant had not qualified as a carrier to transport such intoxicating liquor in interstate commerce from the Republic of Mexico through the State of Texas to the State of North Carolina. (In reply to Appellant's Contention No. 2).

SUMMARY OF ARGUMENT

The Court of Criminal Appeals of the State of Texas having construed the provisions of Article 666-21, Vernon's Penal Code of Texas, which imposes a tax upon any illicit beverage unlawfully imported into the State of Texas to be valid, the imposition of such tax does not violate either Article I, Section 10, Clause 2 (the Export-Import Clause), or Article I, Section 8, Clause 3 (the Commerce Clause) of the Constitution of the United States.

COUNTERPOINT 1
(Restated)

1. The tax in question which was levied upon intoxicating liquor unlawfully possessed by appellant within the State of Texas did not contravene Article I, Section 10, Clause 2 (the Export-Import Clause) of the Constitution of the United States, since it was not a tax or duty on the importation of goods into the continental limits of the United States from a foreign country. (In reply to Appellant's Contention No. 1).

ARGUMENT IN SUPPORT OF COUNTERPOINT 1

An illicit beverage, as defined by the Texas Liquor Control Act, is any alcoholic beverage imported in violation of the Act or upon which any tax imposed by the State of Texas has not been paid and the tax stamp affixed thereto. Art. 666-3a, Sec. (4), Vernon's Texas Penal Code, (App. p. 16). It is unlawful to possess any illicit beverage in the State of Texas. Art. 666-17, Sec. (13), Vernon's Texas Penal Code,

(App. p. 18). However, any person may bring into the State of Texas not more than one quart of liquor for his own personal use, provided that he shall pay the tax and affix thereto the required state tax stamp. Art. 666-23a, Sec. (4), Vernon's Penal Code (App. p. 19).

Article 666-21, Vernon's Texas Penal Code (App. pp. 18-19), levies and imposes a tax upon the first possession of any liquor imported into the State of Texas, and for tax purposes only, distilled spirits imported from any foreign country are subject to taxation and must have affixed thereto the appropriate tax stamp for distilled spirits. Art. 666-17, Sec. (32), Vernon's Texas Penal Code (App. p. 18).

Construeing the foregoing provisions of the Texas Liquor Control Act in the light of the legislative intent in their enactment under Section 2 of the 21st Amendment to the Constitution of the United States, it is clear that the tax in question is one levied upon the possession, legal or illegal, of certain grades of alcoholic beverages within the State of Texas, and is not a tax upon goods imported from a foreign country into the continental limits of the United States.

The Court of Criminal Appeals, the court of last resort in Texas having jurisdiction over criminal offenses, has construed the provisions of Article 666-21 as valid in *Boles v. State*, 137 Tex. Crim. 521, 132 S. W. 2d 881 (1939), upon a factual situation almost indentical with the instant case, save that the alcoholic beverage was brought from the State of Louisiana into the State of Texas without the tax having been paid or the stamp affixed, while here the alcoholic beverage was brought from the Republic

of Mexico into the State of Texas under the same conditions.

Appellant, in contending that the tax in question violates Article I, Section 10, Clause 2 (the Export-Import Clause) of the Constitution of the United States, relies upon the language contained in the Customs Act (19 U. S. C. A., Sec. 1201), which refers to the payment of *duty* upon articles imported into the United States from a foreign country. Appellant attempts to strengthen this contention under the admitted fact that collection stations for the payment of the tax are only to be found at points on the border between the State of Texas and the Republic of Mexico and that no such collection stations are maintained at points on the borders between the State of Texas and the States of New Mexico, Oklahoma, Arkansas, and Louisiana.

The fallacy of this contention is demonstrated by the fact that in all cases where the importation of liquor into the State of Texas upon which the tax has not been paid and the stamp affixed, whether from the Republic of Mexico or from any other state bordering upon the State of Texas, and the possessor of the illicit beverage has been apprehended by the proper authorities, such person has been convicted under the penal provisions of the Texas Liquor Control Act. *Boles v. State*, 137 Tex. Crim. 521, 132 S. W. 2d 881 (1939); *Wyble v. State*, 140 Tex. Crim. 123, 147 S. W. 2d 243 (1940); *Chambless v. State*, 153 Tex. Crim. 5, 216 S.W. 2d 203 (1949); *Horton v. State*, 132 Tex. Crim. 488, 105 S. W. 2d 669 (1937).

The tax imposed by Article 666-21, Vernon's Texas Penal Code, is a tax imposed upon the first

possession of alcoholic beverage within the State of Texas whether such possession be for the purpose of sale or for personal use. It is not an import tax or duty imposed by the State upon the importation, only, of such beverages from a foreign country, or from any other state, and hence is a valid tax which does not contravene or violate the provisions of Article 1, Section 10, Clause 2 (the Export-Import Clause) of the Constitution of the United States.

COUNTERPOINT 2
(Restated)

2. The tax in question, being based upon the unlawful possession of intoxicating liquor within the State of Texas, did not contravene Article 1, Section 8, Clause 3 (the Commerce Clause) of the Constitution of the United States, since, under the laws of the State of Texas, appellant had not qualified as a carrier to transport such intoxicating liquor in interstate commerce from the Republic of Mexico through the State of Texas to the State of North Carolina. (In reply to Appellant's Contention No. 2).

ARGUMENT IN SUPPORT OF COUNTERPOINT 2

Appellant's contention that since he was engaged in transporting eleven fifth-gallons of rum which he purchased in the Republic of Mexico in interstate commerce through the State of Texas for his personal use at his ultimate destination in the State of North Carolina the imposition of the tax in question was void as being violative of Article I, Section 8, Clause 3 (the Commerce Clause) of the Constitution of the

United States, is without merit under the uncontroverted facts.

As has been stated, the tax here in question is one imposed upon the unlawful possession of any illicit beverage in the State of Texas. Appellant brought into the State of Texas from the Republic of Mexico eleven fifth-gallons of liquor for his personal use, although he was permitted to lawfully import into the State of Texas not more than one quart of liquor for his own personal use upon which the tax must have been paid and the stamp showing the payment thereof affixed to the container. The importation for personal use of eleven fifth-gallons of rum into the State of Texas, whether from a foreign country or any other State was unlawful, *per se*, and by operation of law the liquor so imported became an illicit beverage. Article 666-8, Vernon's Texas Penal Code (App. p. 17). Possession of an illicit beverags makes its possessor subject to the tax. *Boles v. State*, 137 Tex. Crim. 521, 132 S. W. 2d 881.

Also, under the provisions of Article 666-27(a), Vernon's Texas Penal Code (App. p. 19), since appellant admitted that he had no permit from the Texas Liquor Control Board to possess or transport said liquor within or through the State, his possession of the illicit beverage could not have been for the purpose of lawful transportation in interstate commerce since appellant had failed to secure a permit which would have authorized its transportation in interstate commerce.

In *Fogle v. State*, 133 Tex. Cr.R. 312, 111 S.W. 2d 246 (1937), the possession of a permit to transport liquor within or through the State of Texas was construed by the Court of Criminal Appeals to be

mandatory. It being uncontroverted that appellant had neither applied for or been granted a permit under the provisions of Article 666-4(a), Vernon's Texas Penal Code (App. p. 16), to transport the liquor in question in his private automobile through the State of Texas while en route to his destination in the State of North Carolina, the decision of the Court of Appeals for the 5th Circuit in *Cartlidge v. Rainey*, 168 F. 2d 841 (1948); (cert. den. 335 U. S. 885), is applicable. In the *Cartlidge* case the liquor had been legally purchased in Louisiana and was being transported through the State of Texas, allegedly in interestate commerce, into the State of Oklahoma. No permit had been issued to the possessor of the contraband liquor by the Texas Liquor Control Board to possess or transport such liquor within or through the State of Texas. In the instant case the liquor, upon which no tax had been paid or stamp affixed thereto, was purchased in the Republic of Mexico for transportation through the State of Texas into the State of North Carolina, and appellant had not applied for or received any permit from the Texas Liquor Control Board to possess or transport such liquor within or through the State of Texas

The Court of Appeals held (p. 843) that "the effect of the Texas Liquor Control Act is to confine the business of transporting intoxicating liquors through the State to those who were licensed as common carriers", and that such "regulation was reasonable and appropriate to the end in view", citing *Ziffrin v. Reeves*, 308 U.S. 132 (1939).

After quoting from other decisions of this Honorable Court, and particularly the case of *Duckworth*

v. Arkansas, 314 U.S. 390 (1941) as to the effect of the 21st Amendment to the Constitution of the United States upon the Commerce Clause (Art. I, Sec. 8, Cl. 3), the Court then held in part as follows:

> "The scheme of the Texas Liquor Control Act is one of strict regulation, and any contention that liquor may pass through the state without a permit is contrary to Article 666-15 of the Act, which classifies permittees. The actual requirement of a permit is contained in the general prohibitions in Article 66-4. Article 666-15 does not exempt any person or class from the requirement of a permit, but merely authorizes permits to be issued to persons of designated classes. . . . (p. 844)
>
> . . . *His contention would leave interstate transportation of liquor in private motor cars free from any local regulation under the police power of the State of Texas; and we are forced to reject it.*"* (p. 845)

But appellant contends that since the liquor in question was purchased in the Republic of Mexico and was being transported by him through the State of Texas for his own personal use in the State of North Carolina, and was not intended at any time for re-sale, use, or disposal in the State of Texas (R. 35), the taxing thereof by the State of Texas was a tax on interstate commerce and therefore violative of Article, I Section 8, Clause 3 (the Commerce Clause) of the United States Constitution. Manifestly, under the undisputed facts, this theory

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* Italics supplied.

is untenable since the attempted transportation through the State of Texas of eleven fifth-gallons of liquor for appellant's own personal use was in excess of the amount of liquor exempted under the provisions of Article 666-23(a), Section (4), Vernon's Penal Code (App. p. 19). If the untaxed liquor had been destined in interstate commerce from the Republic of Mexico to the State of North Carolina through the State of Texas by virtue of the provisions of Article 666-15, Section (12), Vernon's Texas Penal Code (App. p. 17), then unquestionably it would not have been subject to the tax since its transportation in interestate commerce would be accomplished through the agency of a permittee authorized under the Act to transport such liquor. Article 666-21, Vernon's Texas Penal Code (App. p. 18).

It may be argued that since appellant could not have obtained a permit to transport the liquor in question through the State of Texas by private automobile, the provisions of the Texas Liquor Control Act mentioned above which declare such illegally imported liquor to be an illicit beverage and therefore taxable, constitute an unreasonable regulation of the interstate liquor traffic and therefore the tax levied upon such illicit beverage is an undue burden upon interstate commerce. This contention is set at rest by the opinion in *Cartlidge v. Rainey, supra,* (at p. 845), which quotes Mr. Justice Frankfurter in *Carter v. Virginia*, 321 U.S. 131, 142 (1944), as follows:

> "Less than six years ago this court rejected the impossible task of deciding, instead of leav-

ing it for legislatures to decide, what constitutes a 'reaonable regulation' of the liquor traffic."

Appellant was here charged and convicted of possession of an untaxed, illegal beverage, and not with its transportation. Under the decisions of the Court of Criminal Appeals of Texas hereinabove cited, the various provisions of the Texas Liquor Control Act, the validity of which have been challenged by appellant, have been construed to be valid as an exercise of the police power granted to the State of Texas under Section 2 of the 21st Amendment to the Constitution of the United States and, as stated by Mr. Justice Black in *Carter v. Virginia*, 321 U.S. 131, 138.

> "I am not sure that state statutes regulating intoxicating liquor should ever be invalidated by this Court under the Commerce Clause except where they conflict with valid federal statutes."

Appellant has not presented a clear case of the violation of any federal statute in conflict with the provisions of the quoted sections of the Texas Liquor Control Act, nor do the cases cited in this brief refute the principles of law enunciated in the *Cartlidge* case.

CONCLUSION

It is respectfully submitted by the State of Texas, appellee herein, that since the tax in question is not violative of either Article I, Section 10, Clause 2, or Article I, Section 8, Clause 3 of the Constitution of

the United States, the judgment of the Court of Criminal Appeals of the State of Texas should be in all things affirmed.

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PROOF OF SERVICE

I, C. K. Richards, one of the attorneys for the State of Texas, appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of October, 1957, I served a copy of appellees' brief on I. N. Gordon, appellant herein, by mailing a copy in a duly addressed envelope with airmail postage, prepaid, to B. R. Stewart, counsel for appellant, 207 East Harriman, Edinburg, Texas, by depositing the same in the United States Postoffice at Austin, Texas, addressed to the party and at the address above mentioned.

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Attorney for the State of Texas

APPENDIX

CONSTITUTION OF THE UNITED STATES

ARTICLE I, Section 8, Clause 3

To regulate Commerce with foreign nations, and among the several states, and with the Indian Tribes.

ARTICLE I, Section 10, Clause 2

No state shall, without the consent of the Congress, lay any imports or duties on Import and Export, except that which may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on Imports and Exports shall be for the use of the Treasury of the United States and all such laws shall be subject to the revision and control of the Congress.

AMENDMENT XXI

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

TEXAS STATUTES*

Article 666-1

This Act may be cited as the "Texas Liquor Control Act." (p. 85)

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* All page referer es are to Vernon's Texas Statutes (1948 Edition, Volume 2), unless otherwise indicated.

Article 666-3a

The following definitions of words and terms shall apply as used in this Act:

(1). "Alcoholic Beverage" shall mean alcohol and any beverage containing more than one-half of one per cent (½ of 1%) of alcohol by volume which is capable of use for beverage purposes, either alone or when diluted.

(2). . . .

(3). "Distilled Spirits" shall mean alcohol, spirits of wine, whiskey, rum, brandy, gin, and any liquor produced in whole or in part by the process of distillation, including all dilutions and mixtures thereof.

(4). "Illicit Beverage" shall mean and refer to any alcoholic beverages manufactured, distributed, bought, sold, bottled, rectified, blended, treated, fortified, mixed, processed, warehoused, stored, possessed, imported, or transported in violation of this Act, or on which any tax imposed by the laws of this State has not been paid and the tax stamp affixed thereto; and any alcoholic beverage possessed, kept, stored, owned, or imported with intent to manufacture, sell, distribute, bottle, rectify, blend, treat, fortify, mix, process, warehouse, store, or transport in violation of the provisions of this Act. (p. 86)

Article 666-4(a)

It shall be unlawful for any person to manufacture, distill, brew, sell, possess for the purpose of sale, import into this State, export from the State, transport, distribute, warehouse, store, solicit orders for,

take orders for, or for the purpose of sale to bottle, rectify, blend, treat, fortify, mix, or process any liquor in any wet area without first having procured a permit of the class required for such privilege. (p. 86).

Article 666-8

No person shall import into this State any liquor, in excess of one (1) quart, from any source unless a permit be first obtained from the Board, and any person so purchasing or importing liquor in violation of this Section shall be subject to the penalties as hereinafter provided. In addition to the penalties hereinafter provided, any person violating the provisions of this section shall forfeit the liquor so imported to the Board as here provided. (p. 89).

Article 666-15(12)

Carrier Permit. The word "carrier" when used in this section shall mean and include water carriers, airplane lines, all steam, electric, and motor power railway carriers, and common motor carriers operating under a certificate of convenience and necessity issued by the Railroad Commission of Texas or by certificates issued by the Interstate Commerce Commission. The holders of such certificates shall be authorized to transport liquor into and out of this State and between points within this State. Such carriers shall furnish such information concerning the transportation of liquor as may be required by the Board.

The annual State fee for a Carrier Permit shall be Five Dollars ($5). Vernon's Texas Statutes (1950 Supplement) p. 746.

Article 666-17(13)

It shall be unlawful for any person to have in his possession, transport, manufacture, or sell any illicit beverage. Vernon's Texas Statutes (1950 Supplement) p. 754.)

Article 666-17(32)

For tax purposes only, distilled spirits contained in a container having attached thereto the Federal Liquor Strip Stamp or imported from any foreign country are hereby subject to taxation, and must have affixed thereto the appropriate Texas Tax Stamp for distilled spirits. Vernon's Texas Statutes (1950 Supplement) p. 756.

Article 666-21 (in part)

There is hereby levied and imposed on the first sale in addition to the other fees and taxes levied by this Act the following:

(a). A tax of $1.408 per gallon on each gallon of distilled spirits, provided the minimum tax on any package of distilled spirit shall be $0.088.

The term "first sale" as used in Article 1 of this Act shall mean and include the first sale, possession, distribution, or use in this State of any and all liquor refined, blended, manufactured, imported into, or in any other maner produced or acquired, possessed, or brought into this State.

The tax herein levied shall be paid by affixing a stamp or stamps on each bottle or container of liquor. . . .

It shall be the duty of each person who makes a first sale of any liquor in this State to affix said stamp on each bottle or container of liquor and to cancel

the same in accordance with any rule or regulation of the Board. . . . : Any person authorized to export liquor from this State having in his possession any liquor intended for shipment to any place without the State, shall keep such liquor in a separate compartment from that of liquor intended for sale within the State so that the same may be easily inspected and shall attach to each such package of liquor so intended for shipment without the State a stamp of the kind and character that shall be required by proper rule or regulation denoting that the same is not intended for sale within the State. When such liquors are so kept and so stamped no tax on account thereof shall be charged. Vernon's Texas Statutes (1952 Supplement) pp. 897-898.

Article 666-23a (4)

It is provided that any person may bring into this State not more than one quart of liquor for his own personal use; provided, further, that he shall pay and affix thereto the required State tax stamps. (p. 102).

Article 666-27

(a). It shall be unlawful for any person to transport into this State or upon any public highway, street, or alley, in this State any liquor unless the person accompanying or in charge of such shipment shall have present and available for exhibition and inspection, a written statement furnished and signed by the shipper, showing the name and address of the consignor and the consignee, the origin and destination of such shipment, and such other information as may be required by rule and regulation of the Board. It shall be the duty of the person in charge of such

shipment while the same is being transported, to exhibit such written statement to the Board or any of its authorized representatives or to any peace officer making demand therefor, and it shall be unlawful for any person to fail or refuse to exhibit the same upon such demand. Such written statement shall be accepted by such representative or officer as prima facie evidence of the lawful right to transport such liquor. (p. 103).